90-447

Supreme Court, U.S.
FILED
SEP 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

SALSBURY INDUSTRIES, *Petitioner*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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September 1990

QUESTIONS PRESENTED

At common law, a party whose misconduct gives rise to a judicial decree forbidding performance of a contract has no defense of impossibility in an action for breach.

This case presents the question whether the Postal Service, whose status is that of a private commercial enterprise, *Loeffler v. Frank*, 486 U.S. 549 (1988), is exempt from that principle.

It also presents the question whether, in light of *Martin v. Wilks*, 109 S. Ct. 2180 (1989), an injunction against performance of a contract can be used to defeat an action for breach brought by a stranger to the litigation in which the injunction was issued.

RULE 29.1 STATEMENT

The real petitioner in interest is Lightron Corporation, of which Salsbury Industries was previously a division. Lightron and Oneita Industries, Inc. are subsidiaries of Instrument Systems Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Salsbury Industries respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 905 F.2d 1518 and reproduced at page 1a *infra*. The decision of the Claims Court is reported at 17 Cl. Ct. 47 and reproduced at page 17a *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1990. A timely petition for rehearing was denied on July 6, 1990 and the mandate issued below on July 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY, REGULATORY AND CONTRACTUAL PROVISIONS

Section 8(a) of the Postal Reorganization Act of 1970 provides, in pertinent part:

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts . . . shall apply to the exercise of the powers of the Postal Service. 39 U.S.C. § 410(a) (1988).

At the time of the events at issue in this case, § 8-201(d) of the Postal Contracting Manual ("PCM") provided, in pertinent part, that "[c]ontracts shall be terminated, whether for default or convenience, only when such action is in the best interest of the Postal Service, as determined in accordance with this manual." Section 8-202.1 provided that "[r]esponsibility for, and authority to, terminate contracts is vested in the procuring contracting officer . . . responsible for the procurement."

Clause 8(a) of the Postal Service's General Provisions dealt with terminations for convenience. It is part of the contract at issue in this case, and is found in the PCM. It provides, in pertinent part:

> The performance of work under this contract may be terminated by the Postal Service in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service.

STATEMENT

1. ***The parties.*** Salsbury is a manufacturing firm located in Los Angeles. It has been a Postal Service supplier for over ten years. Its performance on the contract at issue in this case was satisfactory. It was found technically and financially capable of meeting the contract's requirements, was early in obtaining first article approval, and was making deliveries ahead of schedule (and therefore earning incentives) until the Postal Service halted the contract. Salsbury has never had a government contract terminated or been found in default. Nothing in the record suggests that Salsbury could not have satisfactorily completed the contract had it been permitted to do so.

The Postal Service is an independent establishment of the executive branch. 39 U.S.C. § 201 (1988). "Payment of any judgment must be made from available USPS funds alone." *Butz Engineering Corp. v. United States*, 204 Ct. Cl. 561, 577, 499 F.2d 619, 628, (1974); *see also Coley Properties Corp. v. United States*, 219 Ct. Cl. 227, 238 & n.2, 593 F.2d 380, 387 & n.2 (1979). "A judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service." 39 U.S.C. § 409(e) (1988). Congress appropriates to the Postal Service all revenues received by the Postal Service. 39 U.S.C. § 2401(a) (1988). Its only other appropriation is compensation expressly for "revenue foregone on free and reduced mail." Postal Service Appropriation Act, 1989, Pub. L. No. 100-440, tit. II, 102 Stat. 1727. It is required to meet its expenses out of income; it does not receive Government subsidies. 53 Fed. Reg. 24265 (1988). While the action is nominally against the United States, Cl. Ct. R. 10(a), therefore, the real respondent in interest is the Postal Service.

2. ***The contract.*** In 1983, the Postal Service awarded Salsbury a substantial contract for the production of lockboxes. In order to make more money from rentals, the contract included a cumulative 10% incentive provision for deliveries ahead of schedule. Pet. App. 27a n.5. Once a contractor began to earn incentives, all it had to do was keep pace with the delivery schedule in order to continue earning incentives. The incentive clause had the desired effect of stimulating early deliveries.

3. ***The* Doninger *case.*** The Postal Service excluded one of the offerors for a lockbox contract (Doninger Metal Products Corp. ("Doninger")) through an improper determination of nonresponsibility. That action was the result of a *de facto* suspension secretly ordered by the Assistant Postmaster General in charge of the Procurement and Supply Department. Pet. App. 49a. In the process, the Postal Service violated its own procurement regulations. Pet. App. 50a & n.5. Doninger was unfairly subjected to disparate treatment from that afforded to the other offerors under the solicitation. Pet. App. 53a & n.8. The Contracting Officer deliberately withheld her written determination of nonresponsibility from Doninger until after contracts had been awarded under the solicitation. Pet. App. 52a-53a. Salsbury was not responsible for or involved in the Postal Service's illegal treatment of Doninger.

Doninger sued the Postal Service in the District Court for the District of Columbia. After a trial, the District Court (Gasch, J.) found that the Postal Service had acted in bad faith. Doninger asked the District Court to order the lockbox contracts terminated. Instead, the District Court directed the Postal Service to suspend the performance of the contracts of the successful offerors and award a contract to Doninger. The unreported decision and the permanent injunction are reproduced at pages 44a-56a *infra*. Salsbury was not a party to the case.

The Postal Service did not move for a new trial or reconsideration. It took an appeal to the Court of Appeals for the District of Columbia Circuit, but voluntarily abandoned it. It never sought a stay pending appeal.

The Postal Service never initiated any settlement discussions with Doninger. Rather, Doninger approached it with a view to securing an agreement under which the Postal Service would not have had to take action with respect to the outstanding lockbox contracts. The Postal Service rejected Doninger's overtures. The Postal Service thought District Court approval was needed to modify the injunction, but never offered to return to that court for approval of a stipulated modification.

Notwithstanding the highly critical decision of the District Court, the Postal Service (a) issued no instructions to its contracting personnel to prevent a recurrence of the events disclosed in the *Doninger* case, (b) disciplined no one, and (c) promoted the individual responsible for the *Doninger* fiasco to an even more senior management position.

4. ***The termination.*** Based solely on the injunction, the Postal Service issued a stop work order to Salsbury and instructed its own personnel to stop issuing delivery orders. Thereafter, it terminated Salsbury's contract for convenience.

The Contracting Officer never made the determination required under the contract that termination would be in the best interest of the Postal Service. Pet. App. 30a. She in fact did not believe it was in the best interest of the Postal Service, and would not have terminated in the absence of the injunction. Pet. App. 31a. She testified that she believed the Postal Service's interest would be best served by overturning the injunction.

Salsbury's claims arise from the incentive clause. One claim ("the pretermination claim"), amounting to $87,266.66, represents the unpaid portion of the incentive Salsbury is entitled to up to the termination. The second claim ("the termination

claim"), amounting to $630,767, represents the incentive Salsbury is entitled to because it was not permitted to complete its contract. With interest from the dates the Contracting Officer received the claims, 41 U.S.C. § 611 (1988), the amount in controversy now exceeds one million dollars.

Salsbury and the Postal Service negotiated a settlement of the termination claim. It makes no reference to the pretermination claim, and that claim formed no part of the negotiations leading to the settlement. Salsbury did not intend to abandon that claim in agreeing to the termination settlement, and the Postal Service, by its subsequent payment of additional pretermination delivery incentives, showed that that was its intention as well.

5. ***The Claims Court decision.*** Salsbury sued in the Claims Court. The parties cross-moved for summary judgment. As to the pretermination claim, Judge Andewelt noted evidence tending to show that neither party intended the settlement agreement as a release of that claim, but found that a genuine issue of material fact precluded summary judgment. He did, however, grant summary judgment for the government on that claim on the theory that the contract did not contain an incentive clause for "accelerated lockbox production (as distinct from accelerated delivery) or any incentive covering lockbox delivery that occurs subsequent to a termination for convenience." Pet. App. 27a & n.5.

As to the termination claim, Judge Andewelt ruled that the Contracting Officer considered termination to be in the Postal Service's best interest; that the District Court did not intend that the Postal Service temporarily suspend the contract; that even if the Contracting Officer misinterpreted what the District Court ordered, "such a good faith error would not itself result in a breach of contract"; and that therefore the Contracting Officer had not abused her discretion. He further held that it was of no moment that the course of action followed by the Postal Service was far more costly than it

would have been simply to settle with Doninger or that the Contracting Officer did not personally make a decision as to which course of action would best serve the Postal Service's interests. Finally, he held that the fact that the Contracting Officer herself believed the District Court's decision to have been wrong was immaterial from the standpoint of deciding what was in the best interest of the Postal Service since the Postal Service's response to that decision served to minimize conflict with another arm of government. Pet. App. 33a-35a.

Distinguishing *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982), Judge Andewelt held that that case "only requires that the events that provoke the government's conclusion that termination is in its best interest be unexpected, *i.e.*, inconsistent with the assumptions of the parties when they entered the contract." Pet. App. 40a-41a. He therefore ruled that it was immaterial that judicial disruption of the contract with Salsbury was a reasonably foreseeable result of the Postal Service's misconduct in its dealings with Doninger. Having found no bad faith directed specifically at Salsbury, Pet. App. 42a, he concluded that Salsbury was not entitled to common law damages for breach.

6. ***The Court of Appeals decision.*** A divided panel of the Court of Appeals affirmed, holding that termination of Salsbury's contract was a proper use of the termination for convenience clause in light of the *Doninger* injunction. Pet. App. 5a-7a. The majority was of the view that the injunction represented a change of circumstances that was unanticipated by either the Postal Service or Salsbury. Pet. App. 8a.

Judge Duff, sitting by designation, dissented. In his view, the Postal Service was chargeable with knowledge that its wrongdoing in excluding Doninger would be found out and the procurement overturned: "the contracting officer had to have known that the Postal Service would get caught." Pet. App. 12a. He concluded that the Postal Service should not be able to use a termination clause to shift that risk to Salsbury.

Pet. App. 12a-13a. "Today," he said, "two wrongs make a right," adding:

> Hereafter, if the government intentionally and unlawfully disqualifies someone when it awards a contract, one should not be surprised when the government forces an innocent recipient of that contract to bear part of the cost of the government's misconduct. Persons doing business with the government should take heed. Pet. App. 13a.

Rehearing and rehearing *en banc* were denied.

7. ***Related cases.*** Two other firms whose contracts were terminated under the same circumstances as Salsbury's instituted proceedings before the Postal Service Board of Contract Appeals. One, *In re Wallace Leisure Products, Inc.*, PSBCA Dkt. No. 1349, was dismissed by stipulation. The other, *In re North American Manufacturing Corp.*, PSBCA Dkt. No. 1386, along with a related action in the Claims Court, *North American Manufacturing Corp. v. United States*, Cl. Ct. No. 531-86C, has been continued pending decision in Salsbury's case.

REASONS FOR GRANTING THE PETITION

The decision below rests on two premises:

1. The Postal Service is just another government agency, and its conduct in contractual matters is subject to rules different from those that regulate the affairs of the private sector firms with which it competes.

2. The Postal Service's refusal to buy the lockboxes it agreed to buy from Salsbury is to be forgiven because it only did what the District Court ordered it to do in *Doninger*.

Both of these premises are profoundly mistaken; together, they will have a substantial adverse effect on the Postal Service's reputation as a reliable partner in the commercial transactions on which it must rely to do business. What is more, because the Court of Appeals wrote sweepingly without regard to the special circumstances of the Postal Service, the mischief that may be anticipated as a result of the mistaken rule it announces will extend to the line agencies of the government, which procure billions of dollars of goods and services each year by contract with private sector firms. The decision below warrants review because of these public policy considerations, because it conflicts with the clear congressional intent to launch the Postal Service into the private sector, and because it repeatedly conflicts with decisions of this Court and other federal and state courts. Mindful of the fact that the congressional channeling of government contract appeals to the Federal Circuit, 28 U.S.C. § 1295 (1988), typically weighs against granting certiorari, here, that very channeling means that the decision below will, unless corrected, have a sweeping effect on this important area of the law.

Unless the Postal Service has a defense, Salsbury is entitled to common law damages (including anticipatory profits) for the Postal Service's refusal to comply with the parties' contract. *G.L. Christian & Assoc. v. United States*, 160 Ct. Cl. 1, 11, 312 F.2d 418, 423, *cert. denied*, 375 U.S. 954 (1963); *e.g., United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919).

In essence, the majority below held that the Postal Service is exonerated because of a court decree that was its own fault, in a case to which Salsbury was not a party. If one of the Postal Service's competitors in the private sector tried to make a similar argument, the outcome is clear, as we explain in Point II. The Court of Appeals gave no basis for concluding that a different result should obtain for the Postal Service.

I

THE POSTAL SERVICE IS GOVERNED BY THE SAME RULES REGARDING BREACH OF CONTRACT AS APPLY TO ITS COMPETITORS

The startling thing about the majority's ruling is its failure even to acknowledge that the Postal Service is not just another federal agency, to be treated, for contract purposes, the same as, for example, the Corps of Engineers. Case after case, since enactment of the Postal Reorganization Act of 1970, has held that Congress had something quite different in mind when it launched the Postal Service into the private sector. By pretending that this basic aspect of the congressional scheme does not even exist, the majority began the inquiry facing in the wrong direction.

"[T]he Postal Service is essentially a communications business with many competitors." 53 Fed. Reg. 24265 (1988). Among the areas of competition are express mail delivery, *e.g.*, *Azar v. U.S. Postal Service*, 590 F. Supp. 948, 950 (N.D. Ind. 1984), *aff'd*, 777 F.2d 1265, 1267 n.1 (7th Cir. 1985); *Portmann v. United States*, 674 F.2d 1155, 1169 (7th Cir. 1982) (same), and bulk mail distribution, *Direct Mail/Marketing Association, Inc. v. U.S. Postal Service*, 555 F. Supp. 816, 817 (S.D.N.Y.), *vacated as moot*, 721 F.2d 55 (2d Cir. 1983), such as that involving daily and weekly newspaper publishers and private delivery companies. *Direct Marketing Association, Inc. v. U.S. Postal Service*, 778 F.2d 96, 101 (2d Cir. 1985).

The Postal Service also competes with private sector commercial mail receiving agencies. These firms rent mailboxes to the public. *Storefront Postal Services Thriving*, N.Y. Times, Mar. 22, 1988, § D, at 1, col. 3. This is a huge business even by the Postal Service's gargantuan standards. In FY1989, the Postal Service earned $362 million in box rent revenues alone. Ann. Rep. of U.S. Postal Service, Fiscal Year 1989, at 52 (1990).

A familiar rule of contract law holds that it is a defense to an action for breach if performance has been rendered impossible. Where, however, the basis for the claim of impossibility is an intervening judicial decree, exacting common law standards must be met. *See generally* Points II(D)-(E) *infra*. Reference to those standards is especially appropriate here because they would apply if any of the Postal Service's private sector competitors in the lockbox market or other parts of its non-first class mail business ever tried to assert a defense of impossibility following the equivalent of the *Doninger* injunction. Since Congress launched the Postal Service into "the commercial world," *Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512, 520 (1984); *see also United States v. Electronic Data Systems Federal Corp.*, 857 F.2d 1444, 1446 (Fed. Cir. 1988), its liability "must be presumed to be the same as that of any other business." *Id.* Its status is that of a private commercial enterprise. *Loeffler v. Frank*, 486 U.S. 549 (1988).

The Postal Service is excused from the normal rules that apply in the private sector only where it can show that a different approach would "pose a threat of 'grave interference' with the Service's operation." *Loeffler v. Frank, supra, quoting FHA v. Burr*, 309 U.S. 242, 245 (1940). There is no evidence that it would be impeded--seriously or otherwise--in its ability to do its job if, in the unusual circumstances of this case, it were denied the benefit of the termination for convenience mechanism and held to the usual norms for the impossibility defense. "[T]he mere obligation to pay money [does not] impair[] the ability of the Postal Service to perform its mission." *Milner v. Bolger*, 546 F. Supp. 375, 379 n.4 (E.D. Cal. 1982).

Not only can it not be said that the Postal Service would be harmed by applying to it the usual rules of the impossibility defense in actions for breach, but there is every reason to believe that its interests lie in precisely the opposite direction. Thus, because the it exists within a competitive sphere, its reputation as a reliable partner is important. *Cf. Diaz v. U.S.*

Postal Service, 853 F.2d 5, 10 (1st Cir. 1988). It could be argued that permitting it to escape liability by means of the termination doctrine where a similarly situated competing private enterprise could not do so is to confer a "dubious privilege" which will ultimately do it "no competitive favor." *Portmann, supra*, 674 F.2d at 1169. But Judge Duff's contrary concern seems far more prudent. A court should not lightly erect doctrines that may be expected to have a chilling effect on the willingness of qualified firms to do business with the Postal Service or any part of the government. To the extent that the decision below would only encourage suppliers to deal with competing lockbox purchasers who are "governed by ordinary principles of commercial law," *Azar, supra*, 777 F.2d at 1271, it defeats the purposes of the Postal Reorganization Act.

The Postal Service has claimed to have "strong incentives to negotiate contracts that return the most for the money and are fair to both sides." 53 Fed. Reg. 24265 (1988). One would never know it from this case. The effect of the decision below is to immunize it from paying for its failure to honor its contract with Salsbury, and to permit it, as Judge Duff noted, to lay off onto Salsbury the economic fallout of its own misconduct vis-à-vis Doninger. Additionally, while damages for breach are principally intended to compensate the nonbreaching party, they serve a further purpose of deterring breach in the first place, and thereby help to ensure the integrity of the system of contracting as a whole. The public interest in the integrity of that system, and in the assumption that contracting entities will do as they promise, is undeniable. That interest, as Judge Duff pointed out in dissent, is ill-served by the result reached below.

We have stressed that the particular character of the Postal Service demands the application of conventional rules of contract law which preclude what is, in effect, an effort to palm off an invalid defense of impossibility as a termination for convenience. But if we are mistaken in this emphasis, and

(as the Court of Appeals held by implication) the same standards apply regardless of which agency or instrumentality had awarded the contract, the result reached by Judge Mayer and Chief Judge Markey would still be plainly wrong because "[t]he government enters into contracts as does a private person, and its contracts are governed by the common law." *E.g., Alvin, Ltd. v. U.S. Postal Service*, 816 F.2d 1562, 1564 (Fed. Cir. 1987). "[A]s a general principle, the rules determining excuses for nonperformance apply within the context of government contracts." *United Technologies Communications Co. v. Washington County Board*, 624 F. Supp. 185, 190 (D. Minn. 1985), *citing* 10 McQuillan, *The Law of Municipal Corporations* § 29.119 at 540 & n.8 (3d ed. 1981).

In summary, if a private firm refused to buy widgets for which it had contracted based on an injunction such as that which issued against the Postal Service in *Doninger*, it would have no defense in an action for common law damages for breach. *See generally* Point II *infra*. The majority's decision, being silent on the entire subject (although it was briefed at length), fails to show why a different rule should apply to the Postal Service. Because it conflicts with *Loeffler* and the other cases defining the private-sector character of the Postal Service, certiorari should be granted.

II

THE *DONINGER* INJUNCTION IS NO DEFENSE TO SALSBURY'S ACTION FOR BREACH

The majority in the Court of Appeals took the position that the *Doninger* injunction was a "proper and sufficient basis for the termination of Salsbury's contract." This was mistaken because (1) Salsbury was not a party to the *Doninger* litigation, (2) the injunction did not compel the action taken, (3) the injunction was caused by the Postal Service's own misconduct, and (4) the Postal Service failed to take steps available to it,

even after the injunction issued, to avert its effect.

A

Salsbury cannot be deprived of its right to damages for breach because of an injunction in a case to which it was not a party

The majority below wrote that it was "significant[]" that "Salsbury was given the opportunity to intervene in the *Doninger* case, where it might well have been able to affect the terms of the injunction, but it chose not to participate." Pet. App. 7a. The majority also implies that a firm whose contract is interfered with as a result of a third party's litigation has no standing to complain. Pet. App. 6a-7a.

This is flatly contrary to *Martin v. Wilks*, 109 S. Ct. 2180 (1989), to which we drew the Court of Appeals' attention. *See also Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934) ("[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights"). Salsbury was aware of the *Doninger* litigation, but it was not a party, not having been joined and, indeed, having been advised by the Contracting Officer that that case was a nuisance suit with no merit and no bearing on its own contract. It had no duty to intervene and is not bound by the result.

By treating Salsbury's nonparticipation in the *Doninger* litigation as "significant," the Court of Appeals inverted the principle of third-party nonpreclusion under the Federal Rules of Civil Procedure as interpreted in *Martin v. Wilks*. Such a decision demands review and correction by this Court.

B

The injunction did not require termination

The Court of Appeals rested its ruling on the notion that the Postal Service acted under judicial compulsion in terminating Salsbury's contract. This was simply not the case. Only the last two paragraphs of the District Court's order were injunctive. The final paragraph may be disregarded because it has no application to this case; this leaves the penultimate paragraph which states in its entirety:

> ORDERED that defendant United States Postal Service shall forthwith suspend the performance of so much of the contracts awarded pursuant to Solicitation No. 104230-82-B-0068 as would have been awarded to plaintiff in January 1983 had plaintiff's offer been accepted in full and award an aluminum door lockbox contract to plaintiff in accordance with that offer . . . . Pet. App. 55a-56a.

This language nowhere employs the term "termination", but rather orders "suspension" of "performance of" contracts. There is a world of difference between the two. *See, e.g., G.C. Casebolt Co. v. United States*, 190 Ct. Cl. 783, 786 n.3, 421 F.2d 710, 712 n.3 (1970) (distinguishing between temporary suspensions of work and permanent directions to stop). That difference was overlooked by the majority below. Where a court intends to direct termination, it can be expected to use the proper term. *E.g., Vibra-Tech Engineers, Inc. v. United States*, 567 F. Supp. 484, 487 (D. Colo. 1983). Judge Gasch's use of the phrase "suspend . . . performance" takes on added meaning because it departed from what he was asked to do, which was to order the contracts terminated. He cannot be assumed to have confused the issue. In any event, if there was some ambiguity as to whether Judge Gasch meant "terminate"

when he wrote "suspend the performance," all the Postal Service had to do was ask for clarification. Fed. R. Civ. P. 59(e), 60(b); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945). It never did.

Because the action taken by the Postal Service was not required by the injunction, the injunction affords no protection against the award of common law damages for breach.

The Claims Court took the position that even if the Contracting Officer erred in deeming the injunction to require termination, "such a good faith error would not itself result in a breach of contract," Pet. App. 33a, and the Court of Appeals' approach, Pet. App. 5a-6a, amounts to much the same thing. This is mistaken because good faith cannot cure a defective defense of impossibility due to an intervening judicial decree. Whether such a decree actually renders performance impossible is not determined according to the party's good faith interpretation of the decree. For example, in *Texas v. New Mexico*, 482 U.S. 124 (1987), the Court rejected a State's argument that it should be exonerated from a breach based on its good faith misinterpretation of an interstate compact.

Even the purest of good faith in complying with an intervening decree will not "launder" misconduct that led to the decree in the first place. If the rule were otherwise, parties could conduct their affairs in ways either calculated or, as here, reasonably foreseeable to lead to injunctions that interfere with existing contractual obligations secure in the knowledge that in the ensuing action for damages for breach they may piously turn their own eyes to the heavens and say that they are merely doing--in the best of good faith--what the courts have ordered. That, however, is precisely the result permitted by the decision below.

C

The termination was not justified by considerations of avoiding conflict with the District Court

The Court of Appeals found the termination of Salsbury's contract justified by the Postal Service's interest in abiding by the District Court's order since "the penalty for declining to do so could be profound; it could even include criminal contempt sanctions." Pet. App. 7a, *citing United States v. United Mine Workers*, 330 U.S. 258, 294 (1947). In this regard, the court drew support from *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964), and *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968), which upheld terminations for convenience as a result of agency acquiescence in a decision of the Comptroller General and pressure from a congressional committee, respectively.

This analysis is seriously flawed.

First, cases involving deference to decisions of the Comptroller General are inapposite. Postal Service procurements are no longer subject to his bid protest jurisdiction. 4 C.F.R. § 21.3(m)(8) (1990); *Falcon Systems, Inc.*, 65 Comp. Gen. 584 (1986). Whatever interest might be served by avoiding conflict with the Comptroller General where line agencies of the government are concerned, Congress in 1970 established a fundamentally different regime for the Postal Service. *See* cases cited p. 11 *supra*.

But even if this change had not occurred after *Reiner* was decided, that case itself carefully distinguished the role of the Comptroller General from that of the courts, noting that the Comptroller General

> can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts

> should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all--not whether another procedure would have been preferable or better attuned to the aims of the competitive bidding legislation. 163 Ct. Cl. at 386, 325 F.2d at 440.

In addition, no agency appeal lies from decisions of the Comptroller General, and Congress requires him to report annually on agency nonacquiescence in his rulings. 31 U.S.C. § 3554(e)(2) (1988); *see Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989). No such reporting requirement applies to agency appeals from judicial decisions. Given these differences in scope, appealability and institutional relationships, cases involving convenience terminations in deference to the Comptroller General hardly dictate a similar result when an agency thinks it is implementing a court order.

Nor can the termination of Salsbury's contract be justified on the basis of *Schlesinger*'s holding that the "best interest" test for terminations for convenience is met when an agency succumbs to pressure from a congressional committee. Unlike District Court orders such as the *Doninger* injunction, no appeal lies from congressional pressure (which is likely to reflect nonlegal considerations). In addition, there is room in such cases for the exercise of agency judgment and discretion in gauging the political winds. But if, as the majority held below, the Postal Service had no choice but to comply with the *Doninger* injunction, no such judgment or discretion was involved here. In any event, we suggest that *Schlesinger* was wrongly decided: a congressional committee cannot force an

agency to break a private party's contract without exposing the government to damages for breach.

Finally, the Court of Appeals' notion that it was reasonable for the Postal Service to terminate Salsbury's contract in order to avoid conflict with the District Court is entirely fanciful. The Postal Service had a perfect right to seek a stay pending appeal and continue to try to overturn the *Doninger* injunction through the appellate process. It elected not to do so. *See* pp. 25-26 *infra*. Resort to an appellate court of competent jurisdiction is neither a contempt of the lower court nor a source of interinstitutional friction, as the decision below hyperbolically suggests. Term in and Term out, federal agencies and instrumentalities invoke this Court's jurisdiction and that of the courts of appeals with no adverse effect on harmonious relations between the Executive and Judicial Branches.

D

The injunction was entirely the Postal Service's fault

1. Whether or not the Postal Service and the majority below read more into Judge Gasch's order than he intended, its actions still fail to meet the requirements for a defense of impossibility. The authorities are in accord that, as Corbin states, "[p]revention of performance by judicial order or decree, at the instigation of third parties, may properly be held to be a valid defense in an action for breach of contract, *if it was not caused by the defendant's own negligence or breach of duty to others* and if no means of avoiding such interference with performance are reasonably available." 6 *Corbin on Contracts* § 1346 (1962 & Supp. 1989) (emphasis supplied). Williston adds:

> No doubt if the legal proceedings interfering with performance of the promise are *in any way due to the fault of the promisor*, as an attachment or receivership to collect a debt or debts rightfully due by him, the interference should constitute no defense, not because it is not the act of the law, but because the impossibility is primarily due to the promisor's own fault, not to fortuitous circumstances beyond his control. 18 *Williston on Contracts* § 1939 at 48 (3d ed. 1978) (emphasis added).

The burden of proof is on the party claiming impossibility. *Id.* § 1978B, at 273, *citing Kiyoichi Fujikawa v. Sunrise Soda Water Works Co.*, 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947); *Paramount Pictures, Inc. v. Sparling*, 93 Cal.App.2d 768, 209 P.2d 968 (1949), *cert. denied*, 339 U.S. 953 (1950). The defense is unavailable to one who has caused the impossibility. *West Haven Sound Dev. Corp. v. West Haven*, 201 Conn. 305, 514 A.2d 734, 739 (1986).

These settled, basic principles of contract law bar any contention that the Postal Service was excused from performance of Salsbury's contract because of the *Doninger* injunction. *See generally* Restatement 2d of Contracts § 264 (1981 & Cum. Pocket Part 1988-89); *e.g., Lowenschuss v. Kane*, 520 F.2d 255, 265 (2d Cir. 1975); *McAleer v. American Tel. & Tel. Co.*, 416 F. Supp. 435, 439-40 (D.D.C. 1976) (Gesell, J.); *Peckham v. Industrial Security Co.*, 31 Del. 200, 113 A. 799 (1921); *see also* UCC § 2-615(a) & Comment 10; *see also W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757, 767 n.10 (1983); Annot., 82 A.L.R.2d 12, §§ 7, 12 (1962, Supp. 1972, Later Case Serv. May 1989) (collecting cases). Departure from these principles pits the decision below against decisions of this Court, several of the geographical circuits and numerous states.

A conflicting district court decision places the error of the Federal Circuit into sharp relief. In *United Technologies*, an unsuccessful bidder (*A*) sought injunctive relief against award of a local government contract. The county defended, among other things, on the ground that if *A* prevailed, it would be because the county erred in its procedures, and that "[s]uch error may subject the County to suit" by the successful offeror, *B*. Judge Rosenbaum correctly observed:

> The Court declines to reach the perverse result that the County's wrongful actions, if any existed, should inure to its benefit by protecting it from an otherwise justified injunction. Any injury resulting to the County from a breach of contract action by [*B*] will therefore not impede the issuance of an injunction in this case. 624 F. Supp. at 190.

The difference from the case at bar is that here the purchaser is attempting to "stand equity on its head," *id.*, in *B*'s action for damages, whereas in *United Technologies*, it sought to do so in *A*'s action for an injunction. The distortion of basic principles of justice remains the same.

If, like a private enterprise, the Postal Service cannot use one third party's misconduct as an excuse for gaining an advantage over another third party, *Kennedy Electric Co., Inc. v. U.S. Postal Service*, 508 F.2d 954, 959 (10th Cir. 1974), how much clearer is it that the Postal Service, like a private enterprise, cannot rely on *its own* misconduct to the detriment of a third party? Since its misconduct was the sole cause of the *Doninger* injunction, the defense of impossibility is unavailable to it.

2. In *W.R. Grace & Co.*, this Court commented that parties not responsible for or aware of the illegality giving rise to an injunction "are not precluded from recovery for the breach." 461 U.S. at 769 n.13. The Court of Appeals' decision conflicts

with this because Salsbury was neither responsible for nor involved in the Postal Service's mistreatment of Doninger. Nor was it aware of the illegality at the time, since the Postal Service had proceeded against Doninger secretly. Pet. App. 49a-53a.

The majority in the Court of Appeals proceeded instead on the assumption that the *Doninger* injunction was a neutral "given" such as to immunize the Postal Service's failure to perform. The law of contracts is flatly to the contrary, for the injunction was caused directly by the Postal Service's own misconduct. The point has been developed in the able student note cited by Judge Duff:

> In assessing the degree and character of change that the government must show to support a convenience termination, a court must focus on whether the government itself bears responsibility for the very changed circumstances it is relying upon to terminate the contract. This element is critically important in applying the *Torncello* standard because a change in circumstances can be truly beyond the bargained-for expectations of the parties only if the events causing the change are beyond the parties' knowledge or control. Otherwise, the convenience-termination clause becomes an exculpatory provision in direct contradiction with the letter and spirit of the *Torncello* holding.

Note, *Limiting the Government's Ability to Terminate for Its Convenience Following* Torncello, 52 Geo. Wash. L. Rev. 892, 903 (1984). "[I]f the supervening event is caused by some fault of a party to the contract, that party may not invoke the defense of impracticability." *Id.* at 906 & n.69.

> In assessing the propriety of a convenience termination, courts should consider several factors. If the termination was based on precontract knowledge, as in

> *Torncello*, the termination should be characterized as improper per se. If the termination is based on post-contract events that result from governmental negligence, the termination is also improper. If the termination is based on other post-contract events, courts should closely examine the events to ascertain whether they are truly beyond the expectations or control of the government. *Id.* at 907.

These observations are entirely consonant with settled principles of contract law. They surely govern where the contracting entity is one that Congress expects to abide by the same rules apply to others in the private sector.

3. The majority took the position that the *Doninger* injunction was unanticipated by either the Postal Service or Salsbury, and that it was therefore proper to invoke the termination for convenience clause. The dissent, on the other hand, stressed that the contracting officer had to have known not only that there had been misconduct in thwarting Doninger's participation in the procurement, but that a court would overturn the procurement. Pet. App. 12a. Judge Duff clearly has the better of the argument.

The *Doninger* injunction was reasonably foreseeable by the Postal Service at the time it entered into the contract with Salsbury. *E.g., United Technologies Communications Co. v. Washington County Board*, 624 F. Supp. 185, 190 (D. Minn. 1985); *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441-42 (S.D. Fla. 1975); Restatement 2d of Contracts § 261, at 313 (1981). The Postal Service knew or should have known that unfairness to an offeror would endanger other contracts that had been awarded under the same solicitation. Termination of successful offerors' contracts is a foreseeable result of a successful bid protest. Doninger's suit was not a baffling bolt from the blue.

Neither was Judge Gasch's ruling. He found:

> The Postal Service's delay in notifying [Doninger] that this nonresponsibility determination had been made, moreover, unnecessarily precluded [Doninger] from protesting the determination before award of contracts under the solicitation. The contracting officer made a written determination of nonresponsibility on November 24, 1982. She deliberately withheld that letter from Doninger. She waited until January 27, 1983 to supply Doninger with the written determination. By that time, of course, the contracts had been awarded to other bidders. Pet. App. 52a-53a (footnote omitted).

He also made findings concerning the Contracting Officer's compliance with (and failure to report) her superior's note illegally instructing her, notwithstanding the procedures governing debarment and suspension, "to supply some reason for the [Doninger] suspension other than [a pending] investigation" into kickbacks. The illicit process of excluding Doninger began with a November 22, 1982 decision by an Assistant Postmaster General to award no more contracts to that firm. Pet. App. 49a. All this came before Salsbury received a contract.

Whether or not the individual employees of the Postal Service subjectively grasped that they were on a collision course with the law is immaterial; it is enough that they should have known. *Cf. S & W Tire Services, Inc.*, 82-2 BCA (CCH) ¶ 16,048, at 79,612, 79,620 (GSBCA 1982), *noted in* 52 Geo. Wash. L. Rev., *supra*, at 905 n.63. Perhaps it simply never dawned on any of them that the procurement was doomed because of their misconduct. This hardly excuses the Postal Service's breach.

The bad faith that infected this procurement was a legal time bomb, but at the time Salsbury obtained its contract, only one of the two parties--the Postal Service--knew or had reason to know it was ticking. The majority's suggestion that both parties were equally in the dark--and that the case involves an unanticipated change of circumstances beyond the Postal Service's control--is an "appeal to unreality." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting).

E

The Postal Service failed In its duty to take affirmative measures to avoid breaching Salsbury's contract

The Court of Appeals majority accepted the Postal Service's view that it had no alternative to terminating Salsbury's contract. That there is a duty to comply with injunctions is beyond dispute. But the law *also* imposes on a party which finds itself subject to an injunction that interferes with its performance under a contract a duty to attempt to overturn or otherwise avert the decree. These duties were not irreconcilable.

Thus, having taken an appeal, the Postal Service could have applied for a stay pending appeal from either Judge Gasch, Fed. R. Civ. P. 62, or, if he declined to grant one, from the District of Columbia Circuit. Fed. R. App. P. 8. This would have lifted any immediate obligation to disrupt Salsbury's contract. Seeking a stay pending appeal, like pressing the appeal itself, would have evinced no lack of "respect for judicial process." *GTE Sylvania, Inc. v. Consumers Union of United States*, 445 U.S. 375, 387 (1980). The majority's suggestion that the Postal Service had to implement the injunction immediately on pain of having its officials hauled off to jail, Pet. App. 7a, is particularly baffling because each of these obvious alternatives was brought to its attention.

Another approach would have been to negotiate a settlement under which Doninger would relinquish its rights under the injunction. Doninger had expressed interest in exploring such a resolution, and Fed. R. App. P. 42(b) permits the parties to an appeal to settle. Again, however, by abandoning its appeal, the Postal Service deprived itself of this option. 9 *Moore's Federal Practice* ¶ 208.05, at 291-92 (2d ed. 1989-90 Cum. Supp.).

The Court of Appeals' failure to acknowledge and apply the settled principle that the Postal Service had a duty to take diligent steps to obtain relief from the injunction so as to permit it to perform its contractual obligation puts its ruling in conflict with prior decisions of several of the geographical courts of appeals and state courts. *E.g., Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir. 1975) (collecting cases). As the Delaware Supreme Court stated in *Peckham, supra*, "in the honest effort to carry out his agreement he must, if possible, procure the dissolution of the injunction." Williston observes (at 50) that the party in breach must have attempted in good faith "to dissolve the injunction or secure the dismissal of the intervening proceeding." *See also, e.g., St. Luke's House, Inc. v. DiGiulian* 274 Md. 317, 336 A.2d 781, 788 (1975).

The Restatement (Second) of Contracts (§ 264 at 332 (Illus. No. 4)) refers to the defendant's "duty of good faith and fair dealing . . . to use diligent efforts which could have secured [the injunction's] dissolution." As one court put it, "[a] party to a contract is under an implied obligation to cooperate in its performance and cannot take advantage of an obstacle to performance which it has created or which lies in its power to remove." *Murphy v. North American Co.*, 24 F. Supp. 471, 478 (S.D.N.Y. 1938) (citations omitted).

The Postal Service's conduct cannot be squared with these obligations. It never sought clarification, reconsideration or a new trial from the District Court. It took an appeal, only to abandon it voluntarily. Given the fact that it continues to dis-

agree with the District Court's findings, its failure to take any of the steps available to it to overturn or modify those findings is fatal to an impossibility defense and, we submit, to the proper use of the termination for convenience doctrine in these circumstances.

Having failed to take any of *these* steps, the Postal Service certainly had an alternative duty to reach an accommodation with Doninger so as to avoid a breach of the lockbox contracts. Here again, it abdicated. It never initiated settlement conversations with Doninger, and when Doninger made settlement overtures, it hastily brushed them aside without even troubling to inform itself as to the financial consequences. Under Fed. R. App. P. 42(b), moreover, "[a]n appeal may be dismissed on motion of the appellant *upon such terms as may be agreed upon by the parties* or fixed by the court" (emphasis added). The Postal Service therefore could have undertaken to negotiate a modification of the injunction in exchange for dismissing its short-lived appeal of Judge Gasch's decision.

It will never be known whether settlement negotiations, a joint request to the District Court to modify the injunction, a motion for reconsideration or a new trial, a request for a stay pending appeal or the abandoned appeal itself would have borne any fruit for the Postal Service--had any of these alternatives been pursued. But this uncertainty must be laid squarely at the door of the Postal Service, and resolved against it. *Day v. Mathews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (per curiam). "[C]ornered by its own actions," *W.R. Grace & Co.*, 461 U.S. at 769, it has no defense of impossibility.

CONCLUSION

While labeled a termination for convenience, the substance of what transpired in this case was a defense of impossibility due to an intervening judicial decree. Such a defense would be frivolous had it been asserted by one of the Postal Service's competitors. Having been launched by Congress into the private sector, the Postal Service should not be permitted to avail itself of an impossibility defense where its competitors could not do so. The Court of Appeals' failure to recognize this pits its decision against the precedents of this Court and numerous other federal and state courts. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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September 1990

APPENDIX

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

89-1592

SALSBURY INDUSTRIES,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Eugene R. Fidell, Feldesman, Tucker, Leifer, Fidell & Bank, of Washington, D.C., argued for plaintiff-appellant. With him on the brief was *Edward S. Wactlar*, Blau, Kramer, Wactlar & Lieberman, P.C., of Jericho, New York, of counsel.

Agnes M. Brown, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Stewart E. Schiffer*, Assistant Attorney General, *David M. Cohen*, Director and *Thomas W. Petersen*, Assistant Director. Also on the brief was *Mark E. Dennett*, Postal Service Counsel, U.S. Postal Service, Washington, D.C., of counsel.

DECIDED: June 13, 1990

Before MARKEY, *Chief Judge*, MAYER, *Circuit Judge*, and DUFF, *District Judge*.*

MAYER, *Circuit Judge*.

OPINION

Salsbury Industries appeals the judgment of the United States Claims Court, 17 Cl. Ct. 47 (1989), sustaining the convenience termination of Salsbury's contract with the United States Postal Service and denying Salsbury certain incentive payments. We affirm.

Background

The Postal Service solicited bids for the manufacture and installation of aluminum post office lockboxes, and Salsbury and four other bidders were awarded contracts. Salsbury's contract required delivery of 2900 lockboxes for $9.7 million, and provided for an additional ten percent incentive payment for lockboxes delivered ahead of the specified delivery schedule. Prior to termination of its contract, Salsbury had delivered almost half of the lockboxes called for in the contract and was paid about $4.6 million, including over $260,000 in incentive payments.

Another bidder, Doninger Metal Products Corporation, had been disqualified because the contracting officer said it was not a responsible offeror. Doninger brought suit in the United States District Court for the District of Columbia

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* Judge Brian Barnett Duff of the United States District Court for the Northern District of Illinois, sitting by designation.

challenging the nonresponsibility determination and asking for an injunction requiring the Postal Service to terminate all contracts awarded under the solicitation and either award a contract to Doninger or resolicit bids. The Postal Service notified Salsbury of Doninger's suit, but Salsbury did not seek to intervene. The district court ruled that Doninger had been unlawfully prevented from receiving a contract and ordered the Postal Service to "suspend the performance of so much of the contracts awarded pursuant to [the] [s]olicitation . . . as would have been awarded to [Doninger] . . . had [Doninger's] offer been accepted in full and award an aluminum door lockbox contract to [Doninger] in accordance with that offer." *Doninger Metal Products Corp. v. United States Postal Service*, No. 83-2725 (D.D.C. Jan. 9, 1984). The Postal Service did not pursue an appeal.

Following this injunction, the contracting officer sent Salsbury a stop work order "to implement the order of the . . . district court." A couple weeks later, the contracting officer notified Salsbury that, effective immediately, its contract was "terminated for the convenience of the Postal Service pursuant to clause 8 of the General Provisions for Fixed Price Contracts." Clause 8 provides in part: "The performance of work under this contract may be terminated by the Postal Service in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service." The Postal Service authorized Salsbury to deliver the lockboxes it had manufactured but not yet delivered prior to termination. Doninger was awarded a $15.7 million lockbox contract.

Salsbury submitted a claim to the contracting officer for $112,639 in delivery incentives allegedly earned prior to termination and was paid $25,457 on this claim. The contracting officer determined that the remaining $87,182 was for post-termination lockbox deliveries to which delivery incentives did not apply.

The parties entered into a settlement agreement under which the Postal Service paid Salsbury an additional $3.4 million in convenience termination costs, which included a profit. This settled all claims arising under the contract prior to the agreement except those specifically reserved. A claim for $630,767, the amount of delivery incentives that could have been earned on the remaining lockboxes due under the contract, was reserved. Salsbury submitted this claim to the contracting officer, and it was denied.

Salsbury then filed a complaint in the Claims Court, claiming $87,182 in incentive payments for lockboxes delivered subsequent to termination, and $630,767 in incentive payments it allegedly would have earned had the contract not been terminated. On cross-motions for summary judgment, the Claims Court held that the Postal Service was entitled to judgment as a matter of law on both claims.

Discussion

Salsbury argues that termination for convenience was improper because the contracting officer never made the required determination that termination was in the best interest of the Postal Service. It relies primarily on the contracting officer's deposition testimony that she thought the Postal Service's interest would be best served by seeking to overturn the district court's *Doninger* decision. The Claims Court reviewed that testimony and concluded: "She testified to the effect that she disagreed with the *Doninger* decision, that had it not been for that decision she would not have terminated the Salsbury contract, that she viewed the decision as requiring her to terminate, and, therefore, that *in the context of the Doninger decision, it was in the best interest of the government to terminate the Salsbury contract.*" 17 Cl. Ct. at 54 (emphasis added).

We agree. The contracting officer considered termination of Salsbury's contract to be in the best interest of the Postal

Service in view of the district court order in *Doninger*. She may have disagreed with the Postal Service's decision not to pursue its appeal of *Doninger*, but it was beyond her authority to change it. The decision about an appeal was made by the Assistant Postmaster General for Procurement and Supply, in coordination with the Assistant General Counsel for the Procurement Division and attorneys at the Department of Justice.[1]

Salsbury points to nothing else in the record that suggests a material factual dispute about whether the contracting officer properly determined that termination was in the best interest of the Postal Service. Evidence cited by the Claims Court supports the conclusion that she made the determination. In the stop work order, the contracting officer wrote that "this action is taken to implement the order of the United States District Court for the District of Columbia in Doninger Metal Products Corporation vs. United States Postal Service." The telex and confirmation letter informing Salsbury that its contract was being terminated stated that the contract was terminated *for the convenience of the Postal Service* in accordance with clause 8 of the contract. Finally, in her final decision on Salsbury's claim for incentive payments on undelivered lockboxes, the contracting officer wrote: "The termination for convenience of Salsbury's contract was made in good faith pursuant to the order of the District Court . . . . Under the circumstances, a complete termination of all

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[1] The record contains a letter from the Assistant Postmaster General for Procurement and Supply, stating: "We will then consult with counsel, who are conferring in the meantime with the Assistant U.S. Attorney. Their preliminary view is that they will not recommend an appeal. I am inclined to agree. We will take whatever action is necessary, based on the advice of counsel, to comply with the court's order."

outstanding contracts was the best way to comply with the Court's order."

It is not the province of the courts to decide *de novo* whether termination was the best course. "In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963).

Salisbury's second argument is that, under *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), the termination of its contract was improper because it was the foreseeable victim of the Postal Service's illegal conduct. As Salsbury sees it, because the Postal Service knew of its misconduct in disqualifying Doninger before it awarded the contract to Salsbury, the *Doninger* injunction does not justify allocating the burden of changed circumstances to Salsbury.

Torncello has nothing to do with this case. It stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause. In that case, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another outfit. When the contractor complained that the government was satisfying its requirements from the cheaper source and ordering nothing from it, in breach of the contract, the government said its actions amounted to a constructive termination for convenience. The court, not surprisingly, held that the government could not avoid the consequences of ignoring its promise to *that* contractor by hiding behind the convenience termination clause. If it could agree to buy services with no intention of doing so, the contract would fail for want of consideration. So the court enforced it as written.

In stark contrast, here the Postal Service entered into a definite quantity contract with every intention of honoring it. The Postal Service's malfeasance in disqualifying Doninger from the solicitation says nothing about its intentions toward

its contract with Salsbury. In fact, the Postal Service did honor it for over a year to the tune of nearly $5 million before Doninger secured the injunction from the district court ordering the Postal Service to terminate the contracts with Salsbury and the other suppliers and to give Doninger what it would have received if its bid had been accepted. The court apparently felt certain that Doninger, as a successful awardee of similar contracts for 18 years, would have gotten at least a portion of this contract as well. Significantly, Salsbury was given the opportunity to intervene in the *Doninger* case, where it might well have been able to affect the terms of the injunction, but it chose not to participate.

Now Salsbury says the illegality of the Postal Service's actions *against Doninger*, not against itself, prohibits the termination of its contract, notwithstanding the district court's order to do just that. A convenience termination is authorized if the contracting officer deems it to be in the best interest of the Postal Service. It strikes us that few things would be more in the best interest of the Postal Service than to abide by the order of the district court, even if it thought the decision was wrong. *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980). The penalty for declining to do so could be profound; it could even include criminal contempt sanctions. *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947).

The *Doninger* injunction was a proper and sufficient basis for the termination of Salsbury's contract. This principle is well-recognized. Convenience terminations have been sustained when they were invoked to avoid conflict with other governmental entities. *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968) (the Navy deferred to the views of a Senate subcommittee); *John Reiner & Co.*, 325 F.2d 438 (compliance with a General Accounting Office ruling). If deference to the nonbinding views of those political bodies supports a convenience termination, it could hardly be otherwise when the contract is terminated because of an order of a United States

district court.

Salsbury's foreseeability argument is also misplaced. It is undisputed that at the time the contract was awarded neither Salsbury nor the Postal Service expected an injunction ordering its termination. The *Doninger* decision was an unanticipated change in circumstances, not merely justifying but compelling termination of the contract.

Because there was a valid termination for convenience, Salsbury is not entitled to payment on either of its claims. The incentive clause of the contract did not provide for post-termination delivery incentives, thus disposing of the $87,182 claim. And it is well-settled that a contractor terminated for convenience is not entitled to anticipated profits. *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 713 (Ct. Cl. 1970). Therefore Salisbury is also not entitled to the $630,767 it seeks for delivery incentives it expected to earn had the contract not been terminated.

Conclusion

Accordingly, the judgment of the Claims Court is affirmed.

AFFIRMED

DUFF, *District Judge*, dissenting.

The government and its agencies enter into contracts as do private persons, and the common law governs them all. The "'avowed purpose and primary function'" of a court when presented with a contractual dispute--including those involving the federal government --"'is the ascertainment of the intention of the parties.'" *Alvin Ltd. v. United States Postal Service*, 816 F.2d 1562, 1564, 1565 (Fed. Cir. 1987) (quoting S. Williston, *A Treatise on the Law of Contracts* § 601 (3d ed. 1961)). *See also Government Systems Advisors, Inc. v. United States*, 847

F.2d 811, 813-14 (Fed. Cir. 1988) (Markey, C.J.). I believe that the court loses sight of this function in this case. Throughout its opinion, the court characterizes the issue as whether the Postal Service's termination of its contract with Salsbury Industries was "improper." Whether the Postal Service acted properly or not is not for us to consider. Rather, the issue for this court is whether the Postal Service and Salsbury Industries intended to allow the Postal Service to terminate its contract with Salsbury with impunity under the circumstances presented here. The Postal Service argues that it had this right under the "Termination for Convenience" clause of its contract. I believe that the parties did not intend that the Postal Service could invoke this provision here, and for this reason I dissent from the court's judgment.

In most contractual disputes, a court begins with the plain language of the parties' contract. That is what the court does in this case. In fact, the court's analysis ends with the language of the contract, too: the court reads, "The performance of work under this contract may be terminated by the Postal Service . . . in whole . . . whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service"; the court concludes that the contracting officer made such a determination in this case, and thus the court holds that the Postal Service acted properly.

By ending its analysis with the words of the parties' contract, the court fails to give full consideration to what the parties intended. Prior to this case, the court has never given the words of similar termination for convenience clauses their plain meaning, as the court below correctly observed. *See* 17 Cl. Ct. 47, 56-58 & n.7 (1989). The termination for convenience clause emerged as a response to problems which the government faced as far back as 1876, and first appeared in defense contracts made during World War I. *See Torncello v. United States*, 681 F.2d 756, 764-65 (Ct. Cl. 1982) (en banc) (Bennett, J., presenting history of clause). The modern clause carries a jurisprudence which shades its plain meaning. *See id.*

at 766 (courts do not apply the clause "as broadly as an untutored reading of words might suggest"); *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988) ("termination for convenience . . . is not of unlimited availability to the government [nor] an open license to dishonor contractual obligations").

Companies should be able to rely upon prior interpretations of termination for convenience clauses when negotiating with the government, rather than insisting on having the government spell out settled law in its contracts. *See* S. Williston, *supra*, at § 615. In any event, judicial interpretations of a contractual provision form part of the background against which parties make their contract. When parties incorporate terms which have settled meanings, it is incumbent upon the court to move beyond the plain language of those terms and look at judicial understandings of them. By doing this, the court gives effect to the parties' intent. This is as it should be, for it is the parties who have bargained, not the courts.

I believe that prior cases of this court and those of its predecessors indicate, at a minimum, that the government may not declare a termination for convenience merely to avoid risks known to the government at the time of contracting. Such was the holding of the majority of judges in *Torncello*. *See* 681 F.2d at 767-72 (Bennett, J., for plurality) (purposes of termination for convenience clause is to allow government to shift risk of unforeseen changes in circumstances to counterparty); *id.* at 773 (Davis, J., concurring) (government may not invoke standard termination for convenience clause to excuse a circumstance which it recognized at the time of contracting). Legal observers have accepted *Torncello* as articulating at least this limit on the government's power to invoke termination for convenience clauses. See Note, *Limiting the Government's Ability to Terminate For Its Convenience Following* Torncello, 52 Geo. Wash. L. Rev. 892, 902 (1984) ("the majority and concurring opinions agree that any termination based on precontract knowledge fails for lack of consideration"). This

court in *Maxima*, underscored this principle, albeit in dicta. *See Maxima*[,] 847 F.2d at 1552.

The court now claims that *Torncello* stands for a much narrower proposition, that it limits the government's recourse to a termination for convenience clause only when the government knows "full well" it will not honor a contract. *Torncello* and *Maxima* lead me to believe that the judges in those cases struggled to attain a wider vision of the doctrine of termination for convenience. Preexisting intent to breach a contract smacks of bad faith, a concept not central to the discussions in either *Torncello* or *Maxima*. If all that the *Torncello* court had to say was that the government should not enter into a contract in bad faith, then the majority of judges in that case expended too great an effort.

The court suggests further that this case stands "[i]n stark contrast" to *Torncello*, principally because the Postal Service intended to perform its contract with Salsbury and did not foresee the injunction which resulted from Doninger Metal Products's lawsuit. In light of what the Postal Service really foresaw at the time it contracted with Salsbury, the Postal Service's intentions were hardly so noble. In 1982, in the midst of Doninger and Salsbury's competition for the lockbox contracts which are at issue in this case, Postal Service inspectors learned of allegations that Postal Service employees had received kickbacks from Doninger on another contract. The Assistant Postmaster General responsible for procurement thus gave oral directions that the Postal Service was not to award Doninger any contracts until after the clouds lifted. The contracting officer who was supervising the bidding on the lockbox contract thereafter "determined" that Doninger was a "nonresponsible offeror," purportedly because of Doninger's inadequate performance under a prior contract. The contracting officer put her reasons in writing in late November 1982, but did not give them to Doninger.

With the field of bidders essentially smaller by one, the contracting officer awarded lockbox contracts to Salsbury and

four other companies in January 1983. It was then that the Postal Service notified Doninger of its disqualification. Doninger protested unsuccessfully to Postal Service, then sued in federal court. After a hearing on the merits, the court determined that the Postal Service's "finding" of nonresponsibility amounted to a de facto suspension of Doninger, one made in violation of Postal Service regulations. The court thus ordered the Postal Service to suspend the performance of the January 1984 lockbox contracts. The Postal Service turned around and told Salsbury to stop work; the dispute over what the Postal Service owed Salsbury resulted in this case.

It is true, in a sense, that the Postal Service did not anticipate the *Doninger* court's injunction when it awarded the lockbox contract to Salsbury. Although the contracting officer intentionally had wronged Doninger, it was possible that Doninger--a company which had done business with the government since 1965--could have had a good cry about losing its contract, and walked away without protesting the injustice done to it. It was also conceivable that Doninger could have filed suit, but then lacked sufficient resources to pursue the matter to final judgment. It was further possible that, once it had discovered the contracting officer's wrongdoing, the *Doninger* court could have ordered a different remedy. Many things were possible, but what was foreseen? Having knowingly and improperly disqualified a company with Doninger's experience, the contracting officer had to have known that the Postal Service would get caught. In our society, wrongdoers usually have to make amends, so the contracting officer must have foreseen the risk that once the Postal Service was caught, any contract tainted by its misconduct would be in jeopardy. Nevertheless, the Postal Service disregarded this risk, and entered into a contract with Salsbury.

Having known of the risk of an injunction at the time if contracted with Salsbury, the Postal Service should not be able to use a termination for convenience clause to shift that risk

to Salsbury now.* The court holds otherwise. Today, two wrongs make a right. Hereafter, if the government intentionally and unlawfully disqualifies someone when it awards a contract, one should not be surprised when the government forces an innocent recipient of that contract to bear part of the cost of the government's misconduct. Persons doing business with the government should take heed.

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* My belief that the Postal Service may not employ the termination for convenience clause in the fashion approved by the court should not indicate that I believe that Salsbury is entitled to all of the damages which it claims.

United States Court of Appeals for the Federal Circuit

89-1592

SALSBURY INDUSTRIES,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

Before MARKEY, Circuit Judge, MAYER, Circuit Judge, and DUFF, J.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on July 13, 1990.

FOR THE COURT,

Dated: July 6, 1990

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

United States Court of Appeals for the Federal Circuit

89-1592

SALSBURY INDUSTRIES,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES CLAIMS COURT

in CASE NO(S). 481-85 C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED JUN 13, 1990 /s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

COST: AGAINST APPELLANT
PRINTING $333.92
TOTAL $333.92
ISSUED AS A MANDATE: JULY 13, 1990

United States Court of Appeals for the Federal Circuit

89-1592

SALSBURY INDUSTRIES,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

Dated: July 27, 1990

cc: EUGENE R. FIDELL
AGNES M. BROWN

IN THE UNITED STATES CLAIMS COURT

No. 481-85C

(Filed: May 17, 1989)

SALSBURY INDUSTRIES,)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

Eugene R. Fidell, Washington, D.C., for plaintiff. *Edward S. Wactlar*, of counsel.

E. Richard Southern, Washington, D.C., with whom were *Assistant Attorney General John R. Bolton*, *David M. Cohen*, D.C., for defendant. *David P. Hendel*, United States Postal Service, of counsel.

OPINION

ANDEWELT, Judge.

In this government contract action, plaintiff, Salsbury Industries (Salsbury), alleges that the United States Postal Service (Postal Service) breached its contract with plaintiff for the production and delivery of aluminum post office lockboxes. This action is presently before the court on cross-motions for summary judgment. For the reasons explained herein, plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted.

Facts[1]

The contract in issue arose out of a May 20, 1982, solicitation by the Postal Service (Solicitation No. 104230-82-B-0068). The solicitation requested bids for the manufacture and delivery of aluminum post office lockboxes that would be installed in post offices for rental to the public. Salsbury and eight other firms submitted bids. On January 28, 1983, Salsbury and four of the other bidders were awarded contracts. One of the unsuccessful bidders, Doninger Metal Products Corporation (Doninger), had not been permitted to submit a "best and final offer" because the contracting officer had determined that Doninger was not a responsible offeror.

Salsbury's contract required it to produce and deliver a definite quantity of lockboxes at a contract price of $9,703,877-.84 in accordance with a specified delivery timetable. To encourage early performance, the contract contained an incentive clause that provided an additional ten percent payment for lockboxes delivered ahead of schedule. Plaintiff began making deliveries pursuant to the contract and all of the lockboxes delivered prior to termination of the contract qualified for the delivery incentive.

On September 15, 1983, Doninger filed suit in the United States District Court for the District of Columbia challenging the contracting officer's determination that Doninger was not a responsible bidder. In its complaint, Doninger requested, *inter alia*, an injunction requiring the Postal Service to terminate for convenience all contracts awarded under the solicitation and to either award a lockbox contract to Doninger or issue a new solicitation for lockboxes. The Postal Service advised Salsbury of the existence of Doninger's suit, but

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[1] The facts material to the granting of defendant's cross-motion for summary judgment are not in dispute.

Salsbury did not seek to intervene.[2]

In an order dated January 9, 1984, the district court held that the contracting officer's finding of nonresponsibility was the product of an unlawful *de facto* suspension of Doninger by the Postal Service. The court ordered the Postal Service to take the following action:

> [D]efendant United States Postal Service shall forthwith suspend the performance of so much of the contracts awarded pursuant to [the solicitation] as would have been awarded to [Doninger] in January 1983 had [Doninger's] offer been accepted in full and award an aluminum door lockbox contract to [Doninger] in accordance with that offer.

Doninger Metal Products Corp. v. United States Postal Service, Civil No. 83-2725 (D.D.C. Jan. 9, 1984) (order denying defendant's motion to dismiss).

On January 12, 1984, the Postal Service, by telex, issued a stop-work order to plaintiff and the other four firms that had received lockbox contracts. The stated rationale for the stop-work order was "to implement the order of the United States District Court for the District of Columbia [in the *Doninger* case]." In the stop-work order, Salsbury was told: (1) not to accept any further delivery orders from the Postal Service or order any new materials; (2) to take inventory of all raw materials and lockboxes (including those in progress and those on hand and ready for shipment); and (3) to complete only the boxes that were on the assembly line.

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[2] Salsbury contends that it did not seek to intervene in Doninger's suit because the contracting officer indicated that the suit was frivolous and had no bearing on Salsbury's contract. The contracting officer, however, does not recollect making any such comments.

By telex, dated January 27, 1984, the contracting officer notified plaintiff that for the balance of the quantity of lockboxes due, plaintiff's contract was thereby "terminated for the convenience of the Postal Service pursuant to clause 8 of the General Provisions for Fixed Price Contracts." Clause 8 provided, in pertinent part:

> (a) The performance of work under this contract may be terminated by the Postal Service in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

The January 17, 1984, notice of termination was confirmed by a letter from the contracting officer dated January 31, 1984, which explained the steps plaintiff should take in view of the termination for convenience.

Prior to the notice of termination, plaintiff had produced and delivered nearly half of the units required by its contract and had earned over $260,000 in delivery incentives. Subsequent to termination, the Postal Service authorized plaintiff to deliver all units that had been finished but not yet delivered. On February 6, 1984, Doninger was awarded a lockbox contract for in excess of $15 million.

Thereafter, plaintiff submitted to the contracting officer a series of certified claims relating to its terminated contract. Plaintiff's first claim, submitted May 30, 1984, sought $112,639-.09 in delivery incentive payments allegedly earned prior to termination. In a final decision dated September 4, 1984, the contracting officer allowed $23,745.75 of that claim to cover

the incentives earned on those lockboxes actually delivered prior to the January 27, 1984, termination. The contracting officer denied the remaining $88,893.34 of the claim, which sought delivery incentives for lockboxes that were manufactured prior to termination but delivered, pursuant to the Postal Service's authorization, after termination. The contracting officer reasoned that the delivery incentive provision of the original contract did not apply to post-termination deliveries and that lockboxes delivered after termination were subject to the provisions of the termination for convenience clause, which did not contain an incentive clause.

After a series of negotiations, on December 7, 1984, the parties executed a termination settlement agreement which granted plaintiff an additional $3.4 million, bringing plaintiff's total payments under the contract to slightly over $8 million. The agreement provided that the $3.4 million settlement payment, combined with prior payments, "constitute[d] payment in full and complete settlement of the amount due the contractor by reason of the complete termination of work under the contract and of all other claims and liabilities of the contractor and the Postal Service under the contract, except as hereinafter provided [*i.e.*, reserved]." The settlement agreement does not contain a specific or express reservation relating to the $88,893.34 claim denied in the contracting officer's final decision of September 4, 1984. It does, however, contain a stipulated reservation of a separate claim by plaintiff, which had not yet been presented in certified form, for $630,767 in incentive payments. The settlement agreement was incorporated in the contract through a January 2, 1985, contract modification.

On March 25, 1985, plaintiff submitted a certified claim to the contracting officer covering the $630,767 in delivery incentives specifically reserved in the January 2, 1985, modification. The claim sought delivery incentives for the remainder of the lockboxes due under the original contract, *i.e.*, the lockboxes Salsbury never produced or delivered but would

have been obliged to produce and deliver had the contract not been terminated.

In a final decision issued on June 3, 1985, the contracting officer denied plaintiff's claim for $630,767 and concluded that the delivery incentive clause in the contract did not apply to deliveries made after the contract had been terminated for convenience. However, based on a recalculation of the incentive payments due for pretermination deliveries, the contracting officer granted plaintiff $1,710.65 in incentive payments in addition to the $23,745.75 she had allowed in her September 4, 1984, final decision. In her June 3, 1985, final decision, the contracting officer recounted the circumstances that led to the termination as follows:

> The termination for convenience of Salsbury's contract was made in good faith pursuant to the order of the District Court for the District of Columbia that the Postal Service "suspend the performance of so much of the contracts awarded pursuant to Solicitation No. 104230-82-B-0068 as would have been awarded to plaintiff in January 1983 had plaintiff's offer been accepted in full and award an aluminum door lockbox contract to plaintiff in accordance with that order . . . ." Under the circumstances, a complete termination of all outstanding lockbox contracts was the best way to comply with the Court's order.

Salsbury filed the present action on August 22, 1985. The complaint alleges that defendant's termination of the contract constituted a breach of contract rather than a proper termination for convenience because the termination was the direct result of the Postal Service's "illegal, bad faith treatment of Doninger, and not the result of any misconduct by Salsbury." The complaint contains two causes of action that correspond to the portions of plaintiff's two certified claims which were denied by the contracting officer. In the first cause of action,

plaintiff seeks $87,182 in incentive payments allegedly due under the contract for lockboxes delivered subsequent to the Postal Service's January 27, 1984, termination of the contract. (The $87,182 sum represents the $88,893.34 denied in the contracting officer's final decision of September 4, 1984, less the $1,710.65 in delivery incentives subsequently awarded by the contracting officer on June 3, 1985.) In the second cause of action, plaintiff seeks $630,767 to cover incentive payments that allegedly would have been earned had the contract not been terminated and had Salsbury produced and delivered early all of the remaining lockboxes called for in the contract.

Discussion

The First Cause of Action

Defendant seeks summary judgment on plaintiff's first cause of action on two independent grounds. First, defendant contends that the claim is encompassed within the general release contained in the December 7, 1984, settlement agreement and, therefore, is barred under the doctrine of accord and satisfaction. Second, defendant contends that, in any event, the termination for convenience was valid and the contract did not provide incentive payments for lockboxes delivered after a termination for convenience.

In response, plaintiff first contends that the settlement agreement did not encompass the first claim and, hence, there was no accord and satisfaction. Second, plaintiff acknowledges that the early delivery incentives in the contract did not apply to deliveries made after a proper termination for convenience. Plaintiff contends, however, that it is entitled to summary judgment because the termination for convenience herein was not valid.

A. *Accord and Satisfaction*

Plaintiff contends that the release in the December 7, 1984, settlement agreement does not constitute an accord and satisfaction barring plaintiff's first claim because the release covers only "termination claims" and plaintiff's claim for $87,182 in delivery incentives for lockboxes built prior to termination is properly characterized as a "pretermination claim."

When interpreting a contract, the court ordinarily focuses on the plain meaning of the contract language. *S.W. Aircraft Inc. v. United States*, 213 Ct. Cl. 206, 212, 551 F.2d 1208, 1212 (1977). It is incumbent upon a contractor that intends to reserve a claim in a settlement agreement to manifest its intention to do so "in a clearly recognizable manner." *Urbanizadora Santa Clara, S.A. v. United States*, 207 Ct. Cl. 297, 305, 518 F.2d 574, 578 (1975).

The release contained in the settlement agreement herein, on its face, is not limited to so-called "termination claims," but extends to "all other claims and liabilities of the contractor" not specifically reserved. The contract modification incorporating the settlement agreement into the contract uses similar broad language providing that Salsbury release the Postal Service from all unreserved claims "arising under the contract prior to execution of the agreement."[3] The release,

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[3] The contract modification provides:

> [T]he contractor agrees to remise, release and discharge the Postal Service, its employees, agents and assignees from any and all claims, liabilities, obligations and demands, asserted or not asserted, arising under the contract prior to execution of this agreement, excepting those items stipulated and reserved from this Settlement Agreement.

therefore, is sufficiently broad to encompass within its plain meaning plaintiff's claim for $87,182.

But a conclusion that the plain meaning of a release would bar a claim is not necessarily the end of the legal analysis. The issue of possible contract reformation remains. A party to a settlement agreement generally would be entitled to have the agreement reformed if the agreement does not accurately reflect the intent of the parties at the time of drafting. *American Employers Ins. Co. v. United States*, 812 F.2d 700, 705 (Fed. Cir. 1987); *Olson Plumbing & Heating Co. v. United States*, 221 Ct. Cl. 197, 210, 602 F.2d 950, 958 (1979). *See also J.G. Watts Constr. Co. v. United States*, 161 Ct. Cl. 801, 806 (1963). Here, plaintiff argues that if its claim is deemed literally within the scope of the release, reformation of the settlement agreement is warranted because neither party intended the release to encompass plaintiff's $87,182 claim.

To support reformation, plaintiff contends that the parties "intentionally excluded" the claim for "pretermination" delivery incentives during the settlement agreement negotiations. Plaintiff argues that the negotiations were intentionally limited to matters within the authority of the termination contracting officer, Mr. Leonard Venturelli, who negotiated the settlement, and did not extend to matters such as the $87,182 "pretermination claim," which previously had been invoiced to and was the exclusive responsibility of the procurement contracting officer, Ms. Sarah Smith.

Salsbury's position is generally supported by the deposition testimony of its own officers and employees. However, the testimony of the relevant Postal Service employees is somewhat more ambiguous,[4] and the broad wording of the

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[4] The testimony of the Postal Service employees related generally to the split in authority between the procurement contracting officer and the termination contracting officer. Mr.

release, which was signed only three months after the contracting officer denied Salsbury's claim for $87,182, supports defendant's position that it intended the release to encompass that claim.

Summary judgment is appropriate only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), and all significant doubt over factual issues is to be resolved in favor of the nonmoving party. *Mingus Constructors*, 812 F.2d at 1390; *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985).

Here, the claim for $87,182 is within the literal scope of the settlement agreement release. But under the bonding precedent cited above, if neither party intended the release to encompass the $87,182 claim, the terms of the contract could

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Venturelli and his subordinate testified that their individual responsibilities with respect to the Salsbury contract were distinct from the responsibilities of the procurement contracting officer, and that the settlement agreement was negotiated in light of that split in responsibility. Moreover, Mr. Venturelli testified that the contract modification of January 2, 1985, did not address any items that were invoiced to the procurement contracting officer. But the Postal Service employees were not asked any direct questions about the terms of the release and the intent of the Postal Service when it included that release in the settlement agreement and subsequent contract modification. No postal official specifically testified that the release was not intended by the Postal Service to be given its plain meaning.

be reformed so as not to bar that claim. The evidence presented to date as to the parties' intent when they executed the settlement agreement is in conflict and results in a genuine issue of material fact. Summary judgment, therefore, is not appropriate with respect to defendant's affirmative defense of accord and satisfaction.

B. *The Unavailability of Delivery Incentives for Deliveries Made After a Valid Termination for Convenience*

There is no dispute that the financial incentives for accelerated performance available to plaintiff under the contract relate exclusively to accelerated deliveries that occur prior to termination of the contract. The contract does not contain any financial incentive covering accelerated lockbox production (as distinct from accelerated delivery) or any incentive covering lockbox delivery that occurs subsequent to a termination for convenience.[5] Plaintiff's argument that it is

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[5] Section H, subsection 13, of the contract, entitled "Delivery Incentive," provides:

> The delivery quantities for each 30 day period are set out in the schedule in Section D. The Postal Service will encourage *accelerated deliveries* pursuant to this provision. The contractor will be paid a 10% premium over the unit price for each unit *delivered* in excess of the required quantity for any delivery period. Such quantities shall be prepared for shipment in sets pursuant to the delivery orders on hand or, if no delivery orders are on hand, in sets of equal quantities of all items (2901, 2902, etc.). Shipment of additional quantities during a delivery period will not reduce the quantity to be delivered in any succeeding delivery period until the total quantity required

entitled to $87,182 to cover deliveries made after the notice of termination for convenience, therefore, rests squarely on its contention that the termination for convenience was invalid. That contention is reviewed at length in the following discussion of plaintiff's second cause of action. Because this court concludes therein that there are no material issues of fact in dispute and that the termination for convenience was valid, defendant is entitled to summary judgment on this first cause of action.

The Second Cause of Action

Plaintiff's second cause of action seeks $630,767 in incentive payments for lockboxes it expected to earn had the contract not been terminated. It is well established that such anticipatory profits would not be available if the contract was properly terminated for convenience. *See, e.g., G.C. Casebolt Co. v. United States*, 190 Ct. Cl. 783, 788, 421 F.2d 710, 713 (1970); *General Builders Supply Co. v. United States*, 187 Ct. Cl. 477, 485-86, 409 F.2d 246, 251 (1969); *Nolan Bros., Inc. v. United States*, 186 Ct. Cl. 602, 607-08, 405 F.2d 1250, 1253-55 (1969).

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by the contract has been delivered.

(Emphasis added.) Section D, subsection 6, of the contract, entitled "*Delivery* and Performance" (emphasis added), provides, in pertinent part:

> Note: Incentives will be granted only with respect to *shipments* of complete units . . . as specified in the individual delivery order.

(Emphasis added.)

Plaintiff attacks the validity of the termination on a number of grounds. Plaintiff contends that the contracting officer never made a determination that termination of the contract was in the best interest of the Postal Service, and even if she did, the termination was invalid for numerous reasons, including that it did not satisfy the legal requirements for a termination for convenience articulated in *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

A. *The Contracting Officer's Assessment of the Best Interest of the Postal Service*

As set forth above, the contract provided that the Postal Service may terminate the contract "whenever the contracting officer shall determine that such termination is in the best interest of the Postal Service." Internal Postal Service Regulation 8-202.1 provides that "responsibility for and authority to terminate contracts is vested in the procuring contracting officer," and that contracts shall be terminated when such action is "in the best interest of the Postal Service."

The communications sent by the contracting officer to plaintiff indicate that the contracting officer, faced with the district court's decision in *Doninger*, intended to, and did, terminate the contract pursuant to the termination for convenience clause. The stop-work order was issued "to implement the order" of the district court in *Doninger*; the subsequent letter and notification of termination indicated that termination was "for the convenience of the Postal Service." The contracting officer's final decision of June 3, 1985, recounted that "[u]nder the circumstances, a complete termination of all outstanding lockbox contracts was the best way to comply with the [*Doninger*] Court's order."

Plaintiff contends that these communications and actions notwithstanding, the contracting officer never made the required determination that termination was in the best interest of the Postal Service. Plaintiff relies in large part on

the following excerpt of the deposition testimony of the contracting officer.

Q. Was the termination of Salsbury's contract in the best interest of the Postal Service?

A. In my opinion?

Q. Yes.

A. I would say no.

Q. Why not?

A. Because once you have a contractor that is actually performing, it is not in the best interest to terminate them. It costs you almost as much to terminate as it would to continue on.

Q. You didn't make a finding then that the termination was in the Postal Service's best interests?

A. To terminate?

Q. Yes.

A. No. We only went by the decision.

When viewed in isolation, this extract of testimony is ambiguous and potentially aids plaintiff. But when the court placed this testimony in the context of the remainder of the contracting officer's deposition testimony and the other undisputed evidence accompanying the cross-motions for summary judgment, the ambiguity seemed to disappear. It appeared that when the contracting officer stated "[n]o. We only went by the decision," she merely indicated that if not for

the district court's decision in *Doninger*, she would not have viewed termination as appropriate, but that in the context of the *Doninger* decision, termination was deemed in the best interest of the Postal Service.

However, to assure that both parties had ample opportunity to clarify any possible ambiguity on this issue, the court permitted the reopening of the contracting officer's deposition. In her additional testimony, the contracting officer indicated that in the portion of her testimony quoted above, she was indicating that "in [her] opinion . . . [she] would not have terminated if it wasn't for the Court's decision." She testified to the effect that she disagreed with the *Doninger* decision, that had it not been for that decision she would not have terminated the Salsbury contract, that she viewed the decision as requiring her to terminate, and, therefore, that in the context of the *Doninger* decision, it was in the best interest of the government to terminate the Salsbury contract.[6]

Plaintiff contends that notwithstanding this additional testimony, for a number of reasons, the contracting officer should not be deemed to have made a valid determination that termination was in the best interest of the Postal Service. First, plaintiff contends that the contracting officer's testimony is evasive and inconsistent with other evidence, including her

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[6] *Inter alia*, the contracting officer testified as follows:

Q. Okay. With respect to the Doninger decision that we have previously discussed, what do you believe concerning the best interest of the Government as far as terminating Salsbury's contract?

A. As far as the Government, the best interest based on the Court decision, we had to terminate.

prior statement quoted in the text above. In view of the alleged inconsistencies, plaintiff contends that the contracting officer's credibility is in issue and summary judgment is therefore inappropriate.

However, after a careful review of her entire testimony and the other evidence of record, the court views Ms. Smith's testimony, in crucial part, as direct, forthcoming, internally consistent, and consistent with the other evidence of record. The evidence of record indicates that Ms. Smith disagreed with the district court's decision, but as a result of the decision, she considered termination of plaintiff's contract to be in the Postal Service's best interest. In its citations to the evidence of record, including Ms. Smith's initial deposition testimony, plaintiff has not demonstrated any genuine issue as to Ms. Smith's credibility that would warrant denial of summary judgment. *See Liberty Lobby*, 477 U.S. at 250-52; *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987) (describing generally the burden on the nonmoving party in response to a properly supported motion for summary judgment).

Second, plaintiff contends that the district court only ordered that the Postal Service "suspend" the other contracts and did not use the word "terminate," and, therefore, the contracting officer was incorrect in her conclusion (which apparently was shared by the Law Department of the Postal Service) that the district court's decision required termination. But is not apparent from the district court's order that the court intended the suspension only to be temporary.

The district court's order makes clear that the court intended the Postal Service to award Doninger a contract for a quantity of lockboxes commensurate with the quantity Doninger would have been awarded had its previous bid been accepted. It also is clear that existing contracts covered the entirety of the Postal Service's lockbox requirements pursuant to the May 20, 1982, solicitation. In this context, the court had the option of limiting its order simply to obliging the

Postal Service to grant the required contract to Doninger. However, the court chose instead to order the Postal Service, in addition, to "suspend the performance of so much of the [five lockbox] contracts . . . as would have been awarded to [Doninger] in January 1983 had [Doninger's] offer been accepted in full and award an aluminum lockbox contract to [Doninger] in accordance with that offer." Clearly, the court used the term "suspend" and not "terminate." But, if the court intended only a temporary suspension, it is not apparent why the court ordered any suspension at all, because a suspension of existing contracts was not necessary if the court intended only to assure that Doninger receive a contract award covering the number of lockboxes it would have received had it not been disqualified.

In any event, even assuming the contracting officer had misinterpreted the requirements of the court's order, such a good faith error would not itself result in a breach of contract. In *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 390, 325 F.2d 438, 442 (1963), *cert. denied*, 377 U.S. 931 (1964), the Court of Claims described the broad discretion permitted a contracting officer in terminating a contract under the government's standard termination for convenience clause. The court stated:

> [A] termination is authorized "whenever the contracting officer shall determine" that it is "in the best interests of the Government." The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the agreement; the article is not restricted, as plaintiff contends, to a decrease in the need for the item purchased. Under such an all-inclusive clause, the Government has the right to terminate "at will" (*Davis Sewing Mach. Co. v. United States*, 60 Ct. Cl. 201, 217 (1925), *aff'd*, 273 U.S. 324 (1927); *Librach v. United States*, 147 Ct. Cl. 605, 611 (1959)), and in the absence of bad faith

or clear abuse of discretion the contracting officer's election to terminate in conclusive. *See Line Constr. Co. v. United States*, 109 Ct. Cl. 154, 187 (1947). *Id.*

Based on the undisputed facts summarized above, the contracting officer's decision to respond to the district court's order by terminating plaintiff's contract for convenience did not constitute a clear abuse of discretion.

Next, plaintiff contends, in effect, that the termination was invalid because it ultimately turned out to be adverse to the financial best interest of the Postal Service. But the contracting officer need not prove ultimately correct in its determination that termination is in the best interest of the government. Rather, it is sufficient under *Reiner* to show the "absence of bad faith or clear abuse of discretion" in the contracting officer's assessment of the government's interest at the time of termination. *Id.* Herein, the Postal Service did not need the additional lockboxes it was obliged to purchase from Doninger, and a Postal Service official concluded that the Postal Service could not reach a satisfactory settlement with Doninger. In this setting, the decision to terminate the contract for convenience did not constitute either bad faith or a clear abuse of discretion even if it turned out that a different approach ultimately may have turned out to be preferable financially.

Next, plaintiff contends that the termination was invalid because the contracting officer did not personally consider certain options to terminating plaintiff's contract for convenience, including the options of seeking reconsideration or clarification of the district court's decision, appealing the decision, or negotiating a settlement with Doninger. But these litigation and strategy-related options were assessed by other officials in the Postal Service and it was not inconsistent with either the contract or the internal Postal Service regulations for the contracting officer to defer to those officials on such issues when making her assessment of the best interest of the

Postal Service.

Finally, it is not significant that the contracting officer believed the district court's decision was wrong. In *Reiner*, the court concluded that a termination for convenience would be valid if it were made in deference to a decision by the Comptroller General that the contract should be cancelled, even when the contracting officer disagreed with the Comptroller's decision. 163 Ct. Cl. at 390, 325 F.2d at 442-43. The court indicated that it would be consistent with the best interest of the contracting agency to "minimiz[e] a conflict with another arm of Government properly concerned with the contractual problem." *Id.* Certainly then it must be consistent with the agency's interest to comply with the perceived scope of a legally binding district court order.

B. *Evaluation of the Lawfulness of the Termination for Convenience Under Torncello*

Plaintiff contends that even if the contracting officer had made an otherwise proper determination that termination was in the best interest of the Postal Service, the termination nevertheless would be invalid because it conflicts in two ways with the standards enunciated in *Torncello*, 231 Ct. Cl. 20, 681 F.2d 756. First, plaintiff interprets *Torncello* as providing that termination for convenience is not available if the act that forms the alleged basis for the termination could be said to be reasonably foreseeable at the time of the contract, and, here, plaintiff contends, the decision by the district court in *Doninger* was reasonably foreseeable. Alternatively, plaintiff contends that termination for convenience is not available under *Torncello* when termination is the result of any bad faith actions by the government, and, here, the *Doninger* decision, which precipitated the termination, was the product of bad faith actions by the Postal Service against Doninger. A close analysis reveals, however, that *Torncello* does not articulate either of the two standards proposed by plaintiff.

The Torncello Decision

Torncello involved a contract in which the Navy, *inter alia*, agreed to pay $500 per call to Soledad Enterprises, Inc. (Soledad) for all of the Navy's pest control requirements at six Navy family housing projects. Soledad sued for breach of contract when, instead of using Soledad, the Navy secured pest control services from the Navy's Public Works Department at prices significantly lower than the Soledad contract price. 231 Ct. Cl. at 22-23, 681 F.2d at 758. Invoking the doctrine of constructive termination, the Navy defended the action on the grounds that the Navy properly could have terminated the contract for convenience prior to its use of the Public Works Department for pest control services at the housing projects.[7]

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[7] The doctrine of constructive termination for convenience permits the government, in certain circumstances, to rely upon the termination for convenience clause in a contract to avoid liability for breach of contract even though the government never actually terminated the contract pursuant to the termination for convenience clause. The scope and origin of the doctrine are explained in *G.C. Casebolt*, 190 Ct. Cl. at 786-87, 421 F.2d at 712, as follows:

> The rule we have followed is that, where the contract embodies a convenience-termination provision . . . a Government directive to end performance of the work will not be considered a breach but rather a convenience termination--if it could lawfully come under that clause--even though the contracting officer wrongly calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground. *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964); *Brown & Son Elec. Co. v. United*

Id. at 21, 681 F.2d at 757.

The Court of Claims, however, disagreed. Based on its interpretation of two distinct principles of contract law, the court concluded that the Navy could not properly have terminated for convenience at the time it decided to use the services of the Public Works Department. *Id.* The first principle of contract law invoked was that consideration is required for a binding contract. The court concludes that "a party may not reserve to itself a method of unlimited exculpation [from the contract] without rendering its promises illusory and the contract void." *Id.* at 26, 681 F.2d at 760. Applying this principle, the court concluded that the Soledad contract would be void for lack of consideration if it were interpreted to permit termination for convenience at the time the Navy decided to give the pest control work to the Public Works Department. The court explained that "the government's promise to turn to Soledad for all of its pest control work, if it was also implicit in the termination for convenience clause

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States, 163 Ct. Cl. 465, 325 F.2d 446 (1963); *Nesbitt v. United States*, 170 Ct. Cl. 666, 345 F.2d 583 (1965), *cert. denied*, 383 U.S. 926 (1966); *Coastal Cargo Co. v. United States*, 173 Ct. Cl. 259, 351 F.2d 1004 (1965); *Warren Bros. Roads Co. v. United States*, 173 Ct. Cl. 714, 355 F.2d 612 (1965); *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968). The principle underlying these decisions is that a party to a contract may 'justify an asserted termination, rescission, or repudiation, of a contract [which turns out not to be well grounded] by proving that there was, at the time, an adequate cause, although it did not become known to him until later.' *College Point Boat Corp. v. United States*, 267 U.S. 12, 16 (1925).

(Footnotes omitted.)

that the government could give Soledad none, was no promise at all. The contract would thus fail." *Id.* at 42, 681 F.2d at 769.

The second principle of contract law invoked by the *Torncello* court was that parties to a contract are assumed to intend to enter into a binding contract. *Id.* at 27, 681 F.2d at 761. Therefore, if two interpretations of a contract are possible, one rendering the contract enforceable and the other void, the contract should be interpreted so as to render it enforceable.

Applying this principle, the court concluded that a somewhat restrictive interpretation of the right of the government to terminate for convenience under the contract would result in adequate consideration and thus an enforceable contract. The court indicated that "it is plain that parties to a contract may freely agree to various forms of risk allocation." *Id.* at 32, 681 F.2d at 764. Therefore, the court reasoned, there would be adequate consideration for the termination for convenience clause if the clause were interpreted to allocate risk in that the government could terminate for convenience when there were significant changes in "the circumstances of the bargain or in the expectations of the parties." *Id.* at 48, 681 F.2d at 772. The court, however, found no significant change in the expectations of the parties in *Torncello* because the Navy had known at the time it entered the contract with Soledad that it could get pest control services more cheaply elsewhere. *Id.*

Thus, in *Torncello*, the Court of Claims limited the government's use of the termination for convenience clause because on the facts of that case the court concluded that, absent such a limitation, the particular contract involved would be void for lack of any government consideration. The case at bar can be factually distinguished from *Torncello* in ways that would appear to show the presence of contract consideration by the government without resort to an interpretation of the termination for convenience clause that is narrower than

its plain meaning.[8] *See id.* But it is not necessary to rely upon any of these factual distinctions because, as explained below, even assuming that the only possible source of government consideration in the Salsbury contract is through the narrow interpretation of the termination for convenience clause employed in *Torncello*, plaintiff could not prevail under that interpretation.

Torncello Does Not Apply a Reasonable Foreseeability Test

Plaintiff contends that the Postal Service's misconduct in the procurement process was necessarily known to the Postal Service prior to the execution of the contract with Salsbury

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[8] For example, in *Torncello*, the contractor did not perform any duties and the government did not make any payments under the contract. In this action, however, there was significant performance under the contract by both parties; Salsbury delivered substantial goods and the Postal Service made substantial payments, including payments pursuant to the government's obligations under the termination for convenience clause. It cannot be disputed that after Salsbury commenced performance the Postal Service was bound under the contract to make certain payments, even if it later chose to terminate the contract for convenience. Another distinction is that in this action, the Postal Service terminated for convenience pursuant to the terms of the contract which required the government to give notice of any termination for convenience. In *Torncello*, the termination for convenience occurred without notice pursuant to the doctrine of constructive termination. (*But see Torncello*, 231 Ct. Cl. at 44 n.10, 681 F.2d at 770, where the court indicates that a requirement of notice before termination may not be sufficient to constitute consideration.)

because Doninger was improperly excluded from the procurement process prior to that event. Therefore, plaintiff contends, the district court's order in *Doninger* was "reasonably foreseeable" to the Postal Service at the time it entered the Salsbury contract and the Postal Service could not, consistent with *Torncello*, terminate that contract in response to such a reasonably foreseeable event.[9]

This argument misreads *Torncello*. The *Torncello* analysis does not involve an assessment of whether the acts that precipitated the termination were "reasonably foreseeable." As explained above, *Torncello* is not based on equitable notions concerning treatment of government contractors, but rather on specific, articulated principles of contract law. The court concluded that "a power to terminate must be limited in some meaningful way, as measured by the requirement of consideration," *id.* at 48, 681 F.2d at 772, and that, in the absence of something else to furnish consideration, consideration would exist if the termination for convenience clause were interpreted to allocate to the contractor the risk that there would be "some kind of change from the circumstances of the bargain or in the expectations of the parties." *Id.*

Reasonable foreseeability is a very different concept than the actual expectations of the parties. A wide and disparate spectrum of events could, based on an objective analysis, be deemed "reasonably foreseeable" to the parties when they entered the contract even though, in fact, the events were not in any way expected by the parties. *See, e.g.*, 5 Corbin, Corbin on Contracts ¶ 1009 (1963) ("reason to foresee is not actual foresight"). But *Torncello* only requires that the events that

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[9] Defendant disputes that the *Doninger* decision was "reasonably foreseeable." However, it is not necessary to evaluate the parties' respective claims as to foreseeability since, as explained *infra*, this court concludes that "reasonable foreseeability" is not the controlling standard.

provoke the government's conclusion that termination is in its best interest be unexpected, *i.e.*, inconsistent with the assumptions of the parties when they entered the contract. It does not require that the events also not be reasonably foreseeable to the parties. *See Nationwide Roofing and Sheet Metal Co. v. United States*, 14 Cl. Ct. 733, 736 (1988) (refusing to interpret *Torncello* as prohibiting termination where the government "should have known" of the act that precipitated termination at the time of entry into the contract).

Herein, there can be no dispute that the *Doninger*, decision, which was the cause of the termination, was not expected by the parties at the time of the contract. At that time, the contracting officer had excluded Doninger from the bidding and the Postal Service was entering contracts with the five successful bidders to supply all of the Postal Service's lockbox requirements. The *Doninger* decision, unexpectedly, obliged the contracting officer to enter a contract with Doninger for a substantial number of additional lockboxes. A basic assumption that the Postal Service had relied upon when it entered the contract with plaintiff was that it needed all of the lockboxes Salsbury had agreed to produce. The effect of the *Doninger* decision, therefore, was to eliminate that previously assumed need. As a result, the Postal Service would no longer secure from continuation of the Salsbury contract the full benefits it had expected to secure when it entered the contract. Termination for convenience in the context of this unexpected event is fully consistent with the analysis of *Torncello*.

Torncello and Bad Faith Decisions to Terminate

Plaintiff relies primarily on *Torncello* to support its contention that termination for convenience is not permissible here because the termination stems from bad faith actions by the government against Doninger. The discussion of bad faith in *Torncello* is brief and focuses exclusively on the contracting

officer's intent when terminating the contract for convenience. In *Torncello*, the Navy knew at the time it entered the contract with Soledad that the pest control services were available elsewhere at a cheaper price, and the *Torncello* court stated that "the government cannot invoke the [termination for convenience] clause where . . . the contracting officer lacks good faith in the determination of interest." 231 Ct. Cl. at 44-45, 681 F.2d at 770.

But here, plaintiff does not allege that the contracting officer lacked good faith when she evaluated the Postal Service's interest and terminated plaintiff's contract. Indeed, plaintiff apparently does not allege that the contracting officer, at any time, undertook any action in bad faith against plaintiff. Rather, plaintiff contends merely that the termination was the ultimate result of previous bad faith actions by the Postal Service against Doninger.

Plaintiff has not cited any case in which the government has been prevented from terminating a contract for convenience solely because it had previously dealt in bad faith with a third party that was not a party to the contract in issue. Moreover, such an extension of the law would appear clearly unwarranted here. The Postal Service entered into a contract with Salsbury that included a termination for convenience clause which gave the Postal Service certain rights. Since the Postal Service cannot be said to have breached any obligation it owed directly to plaintiff under the contract, the government should not be prevented from exercising its rights under the contract's termination for convenience clause. *See, e.g., McFadden, Inc. v. United States*, 215 Ct. Cl. 918, 921-22 (1977) ("[i]n the absence of malicious intent or animus *toward the plaintiff* on the part of the government officials, the plaintiff is entitled only to the compensation provided under the termination-for-convenience clause") (emphasis added). *See also, Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198-99, 543 F.2d 1298, 1302 (1976), *cert. denied*, 434 U.S. 830 (1977); *Descon System, Ltd. v. United States*, 6 Cl. Ct. 410, 413

(1984).[10]

Conclusion

In sum, defendant's cross-motion for summary judgment is sufficient to demonstrate the absence of any dispute as to a material fact and that defendant is entitled to judgment as a matter of law. Plaintiff has not presented evidence sufficient to demonstrate the existence of a genuine dispute as to a material fact. Therefore, plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted. The Clerk of the Court shall dismiss the complaint. No costs.

IT IS SO ORDERED.

ROGER B. ANDEWELT
Judge

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[10] Indeed, rather than necessarily being harmed by the Postal Service's allegedly bad faith disqualification of Doninger, plaintiff may potentially have benefited. Doninger's disqualification apparently made profitable contracts available to bidders such as Salsbury who otherwise may not have received an equivalent contract. Moreover, while it is possible that Salsbury may not have been harmed by the disqualification of Doninger, it cannot be disputed that the Postal Service was harmed. Plaintiff acknowledges that the ultimate result of excluding Doninger as a bidder was that the Postal Service was forced to pay millions of dollars more for the lockboxes than it would have had to pay had it not disqualified Doninger. Lessons that costly tend to be learned and should produce a strong deterrent against any similar disqualifications by the Postal Service in the future.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONINGER METAL PRODUCTS CORP.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 83-2725
UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	

MEMORANDUM

This is an action to enjoin the performance of contracts awarded by the United States Postal Service for the manufacture of postal lockboxes. Pursuant to agreement of the parties and Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court consolidated the hearing on plaintiff's motion for a preliminary injunction with a hearing on the merits. This memorandum constitutes the Court's findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

BACKGROUND

Doninger is a small, family-owned manufacturing company. Its business is composed principally of the manufacturing of postal lockboxes under contracts with the United States Postal

Service.[1] Doninger has been a Postal Service contractor for approximately eighteen years.

In 1982 the Postal Inspection Service began an investigation of Doninger in connection with alleged kickbacks. While this investigation was underway, the Assistant Postmaster General in charge of Procurement and Supply gave oral directions that no contracts be awarded Doninger pending termination of the investigation. Shortly thereafter, the contracting officer in charge of a solicitation then in progress determined that Doninger was a nonresponsible offeror under the pending solicitation. This determination purported to be based on Doninger's inadequate performance under the aluminum door lockbox contract then in progress. Although the contracting officer put this determination in writing on November 24, 1982, the contracting officer withheld written notification from Doninger until the contracts were actually awarded in late January. As a result, Doninger's protest was not filed in time to obtain preaward review. Doninger filed a protest on February 3, 1983. After suspending Doninger on June 3, the Postal Service dismissed the protest on June 17 because suspended bidders lack standing to sue. Doninger filed a request for reconsideration on June 29 (within the twenty-day time period provided for in PCM 2-407.8(1)). On July 29, the Postal Service terminated Doninger's suspension. The Postal Service subsequently affirmed its dismissal for want of standing.

Doninger has brought this suit for declaratory and injunctive relief. The plaintiff contends that the Postal Service's actions constituted a *de facto* suspension of Doninger from Postal Service contracting without the procedural protections provided for in the Postal Contracting Manual

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[1] The Postal Service is an independent establishment of the executive branch of the United States government. 39 U.S.C. § 201.

(PCM) and required by the due process clause of the Fifth Amendment of the United States Constitution. The plaintiff further argues that the contracting officer's reliance on erroneous and outdated information and application of a more lenient set of standards to the successful offerors than to Doninger made the nonresponsibility determination arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

The plaintiff also contends that the Postal Service's failure to give timely notification of the nonresponsibility determination denied the plaintiff the benefits of regulations that would have required suspension of the award of contracts pending resolution of a pre-award protest. Also in connection with the post-award protest actually filed, the plaintiff argues that once the plaintiff did submit its protest the Postal Service should have suspended performance of all contracts awarded under the solicitation until the protest was decided. The plaintiff further alleges that suspension of Doninger just prior to basing its dismissal of the protest on the rule that suspended bidders lack standing to protest was illegal.

The plaintiff additionally claims that the Postal Service wrongfully withheld documents requested under the Freedom of Information Act (FOIA).

The defendant, just prior to trial, moved to dismiss for want of jurisdiction and standing or in the alternative for summary judgment. The Court initially addresses the defendant's motions. For the reasons that follow, these motions are denied.

THE DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The Court has subject matter jurisdiction over this action. 28 U.S.C. § 1331(a) gives the district court jurisdiction over causes of action arising under the Constitution and laws of the United States. 28 U.S.C. § 1339 gives the district court

jurisdiction over causes of action arising under the Postal Reorganization Act. The plaintiff alleges violations of the United States Constitution and Postal Service regulations. Validly issued regulations provide independent bases for jurisdiction.[2] See *Peoples Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1190 (7th Cir. 1981); *Association of National Advertisers, Inc. v. Federal Trade Commission*, 617 F.2d 611, 619 (D.C. Cir. 1979).

Establishing that a court has jurisdiction to hear a suit does not establish that the suit raises issues amenable to judicial resolution. *National Association of Postal Supervisors v. United States Postal Service*, 602 F.2d 420, 429 (D.C. Cir. 1979) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1945)). The existence of jurisdiction, however, does trigger a presumption in favor of judicial review of an administrative agency act. *Id.* (citing *Barlow v. Collins*, 397 U.S. 159 (1970); *Harper v. Levi*, 520 F.2d 53, 67 (D.C. Cir. 1975)).

The Postal Reorganization Act does not expressly preclude judicial review of the Postal Service's contract decisions. Absent strong evidence to the contrary, the Court should, therefore, assume that reviewability is intended. *See Dunlop v. Bachowski*, 421 U.S. 560, 567 (1974); *Barlow v. Collins*, 397 U.S. at 159, 165-66.

Although Congress exempted the Postal Service from federal contract law, 39 U.S.C. § 410 (a), in order to permit it to operate in a businesslike manner, *see Beneficial Finance Co. of New York, Inc. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978), it did not evince an intention to preclude all judicial review. *See National Association of Postal Supervisors v. United States Postal Service*, 602 F.2d at 432; *NAACP v. United States Postal Service*, 398 F. Supp. 562, 563 (N.D. Ga. 1975).

The defendant suggests that *Scanwell Laboratories, Inc. v.*

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[2] The PCM is issued under authority of Title 39 of the United States Code. PCM § 1-102.

Shaffer, 424 F.2d 859 (D.C. Cir. 1970), recognizing a disappointed bidder's right to sue under the APA,[3] is inapplicable here inasmuch as the APA is inapplicable. The defendant, therefore, asks the Court to apply the earlier rule of *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), that bidders have no standing to sue an agency. *Id.* at 127. *Scanwell*, however, does not rely solely on Congress' enactment of the APA to support its decision in favor of the bidder's standing to sue. *See* 424 F.2d at 864-868. Rather than carving out an exception to *Lukens Steel* under the APA, the *Scanwell* Court recognized that the entire "basic approach of the Supreme Court in the *Lukens Steel* case had been legislatively reversed by the Congress." 424 F.2d at 867.

The defendant argues that, if judicial review is proper at all, it should not be by trial de novo. Defendant contends that there exists no issue of material fact as to whether a *de facto* suspension occurred, and that summary judgment on that issue is therefore appropriate. On the question of the Postal Service's nonresponsibility determination, the defendant argues that, by analogy to the APA, the Court should restrict its review to the administrative record.

The Court recognizes the presumption in favor of restricting review to the administrative record. Nevertheless, where, as here, the plaintiff contends that a *de facto*, "off the record," suspension has occurred, a decision to restrict review to the administrative record would have the effect of precluding any review at all. The gist of the plaintiff's argument is that the *de facto* suspension occurred and that the nonresponsibility determination effectuated that suspension. It is the plaintiff's contention that the basis for the nonresponsiblity determina-

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[3] *Scanwell* survives *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F. 2d 838, 841 (D.C Cir. 1981).

tion that appears in the record is actually after the fact justification for a decision based on illegal grounds. It is unnecessary for the Court to ascertain whether the rationale supplied by the defendant for its nonresponsibility decision would suffice absent the illegal *de facto* suspension that precipitated that determination. The inadequacy of that rationale is, however, noteworthy inasmuch as it supports the conclusion that a *de facto* suspension occurred.

THE DE FACTO SUSPENSION

The Postal Inspection Service began an investigation of Doninger in early 1982. The investigation centered on allegations that Postal Service employees had accepted kickbacks from Doninger. On November 22, the Assistant Postmaster General (APMG) for procurement and supply announced to Mr. Hansen and Mr. Siggins of the Postal Service that Doninger was to receive no more contracts until the completion of the Postal Inspector's investigation. PCM § 1-605.2 requires the APMG to issue a notice of suspension that describes the suspension's basis and 39 C.F.R. § 957.27 outlines procedures for suspending contractors. The APMG complied with neither of these. Mr. Hansen informed the contracting officer in charge of solicitation No. 104230-82-B-0068 that the APMG had ordered that no contracts be given Doninger until completion of the investigation. He also wrote to the contracting officer that she would have to supply some reason for the suspension other than the investigation. The contracting officer than prepared a notice of nonresponsibility.[4] The APMG's order constituted a *de facto* suspension.

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[4] If the contracting officer had chosen to disregard the APMG's order, the APMG would have had to approve that choice, since any procurement over $3 million must be approved by the APMG.

This was in violation of PCM § 1-603.2, 39 C.F.R. § 957.27 and 39 C.F.R. § 447.21(a)(5), which forbids making decisions outside official channels.[5]

The contracting officer did, as directed, supply reasons for the APMG's decision, but these were supplied after the fact. Moreover, these reasons--essentially, the plaintiff's delinquency in meeting its obligation under a prior contract--did not independently supply an adequate basis for the contracting officer's decision.

THE RATIONALE OF RECORD FOR THE NON-RESPONSIBILITY DETERMINATION

On May 20, 1982, the United States Postal Service Procurement and Supply Department issued Solicitation No. 104230-82-B-0068 for series 2900 and 1800 post office lock boxes. The solicitation indicated that technical proposals would be found acceptable only if the Postal Service found that the offeror could comply with the proposed delivery schedule.

In September, 1982, the Postal Service found Doninger's technical proposal to be acceptable. Doninger was the lowest offeror of the seven companies whose technical proposals were acceptable. Doninger was already manufacturing 2900 series boxes under contract 104230-81-V-H775 (contract H775), entered with the Postal Service in September 1981, and scheduled to be completed in June 1983. Production on H775 was underway when the Postal Service conducted a pre-award survey at the Doninger plant. The results of this survey were reported to the contracting officer, Sarah E. Smith, on November 10, 1982.

At the time of the survey Doninger was demonstrating an

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[5] The Postal Service employee's failure to report this illegal act violated 39 C.F.R. § 447.71.

ability to manufacture 12,000 modules per month, the number required by the contract. Prior to that time, however, Doninger had experienced personnel and machinery problems causing delinquencies that resulted in a cure notice being sent to Doninger on November 9, 1982. At a meeting on November 18, 1982, plaintiff explained the reasons for delinquencies and arranged with the Postal Service to accelerate November production to regain compliance with delivery schedules. It became impossible to accelerate, however, because Postal Service-furnished locks delivered to Doninger in that time were rejected by Doninger because of defects.

Beginning with a shipment received on November 4, 1982 of American Lock Company locks, locks delivered to Doninger were defective in that the screws securing the cam to the lock cylinder were coming out. In the finished lockboxes with these defective locks the cam was able to rotate freely, causing the lockbox door to open inadvertently or making it impossible to insert the key completely into the lock. The manufacturer of these locks had used self-tapping screws in untapped holes, rather than the threaded screws in tapped holes that its contract with the Postal Service required. This resulted in the problems Doninger discovered.

The contracting officer was the party empowered to advise the plaintiff as to how to treat the defective locks. On November 16, 1982, a Postal Service quality insurance specialist made a routine visit to the plant and advised the plaintiff to use the screws. Absent authorization from the contracting officer to keep and use the defective locks, however, Doninger would be liable for any lockbox defects discovered in the field.

Doninger requested instructions in a November 22 letter and again in letters on December 10, 14, 23, 1982, and January 6 and 21, 1983. The Postal Service failed to respond. On November 10, 1982, when plaintiff rejected the first shipment of defective locks, it had on hand only enough nondefective locks for thirteen days of production. It did not

receive additional locks until December 27, 1982.[6] The absence of locks during this period precluded Doninger from complying with its agreement to accelerate in November to make up for earlier delinquencies and to complete the production by June 30, 1983.

The Postal Service wrongfully purported to base its nonresponsibility determination on the plaintiff's delinquencies under contract H775. These delinquencies, however, were entirely the fault of the Postal Service. The Postal Service's reliance thereon was thus misplaced.

PCM § 1-903.1(iii) provides that deficient deliveries caused by circumstances beyond the contractor's control shall not be considered in the contracting officer's evaluation of responsibility. PCM §1-905.1(b) and PCM § 1-905.2 require the contracting officer to base responsibility determinations on current information. The contracting officer's determination did not comport with the requirements of these provisions.

The Postal Service's delay in notifying the plaintiff that this nonresponsibility determination had been made, moreover, unnecessarily precluded the plaintiff from protesting the determination before award of contracts under the solicitation.[7] The contracting officer made a written determination

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[6] The use of air freight to ship the locks to plaintiff is indicative of the defendants' cognizance of the disability under which Doninger was operating.

Although it was essential for Doninger to have advance knowledge of deliveries scheduled, the defendant never provided such information until March of 1983.

[7] Section 2-407.8(m) of the Postal Contracting Manual (PCM) provides that, for protests received before the contracts are awarded, award of the contracts is suspended pending a decision of the protest unless the Postal Service

of nonresponsibility on November 24, 1982. She deliberately withheld that letter from Doninger. She waited until January 27, 1983 to supply Doninger with the written determination. By that time, of course, the contracts had been awarded to other bidders.

DISCRIMINATION AMONG BIDDERS

Disparity of treatment between Doninger and other delinquent contractors also indicates that the delinquency was not the reason for the Postal Service's decision. This discrimination violated the requirement that the Postal Service be equal handed in its treatment of firms and individuals. *See* PCM § 2-301(a), § 2-407.8(b); 39 C.F.R. § 447.21(a)(2) (1982). The Postal Service appears to have applied stricter standards to Doninger than to other contractors, since several contractors who received new lockbox contracts were more delinquent in their performance than Doninger was.[8]

FOIA

Because the defendant has now released the documents that are the subject of the plaintiffs' FOIA claim, the Court

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would be seriously injured by such suspension. After contracts are awarded, there is no presumption in favor of suspension of performance pending the outcome of a protest. *See* PCM § 2-407.8(1).

[8] In November, 1982, for example, three lockbox manufacturers who subsequently were awarded contracts under the new solicitation, Salsbury, North American, and Wallace, were 11%, 14% and 17% (two contracts) and 9% behind on deliveries. At the same time Doninger was 3% behind on deliveries.

does not address that claim.

APPROPRIATENESS OF INJUNCTIVE RELIEF

In considering a bidder's request for injunction of the procurement process in a government agency, the court may grant such an injunction only where there has been a clear showing of illegality. *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1303 (D.C. Cir. 1971). Here, such a showing has been made. As discussed above, the APMG's *de facto* suspension of the plaintiff violates a number of regulations promulgated under the Postal Reorganization Act.

The legal remedy available to the plaintiff, the cost of bid preparation, is inadequate. The effect of the APMG's *de facto* suspension of the plaintiff is to put the plaintiff out of business. Equitable relief is thus appropriate.

Moreover, three factors indicate that the public interest will be best served by granting the requested injunction. First, it is important that Postal Service contracting be conducted in accordance with the principles of efficiency and economy exemplified in the regulations here violated. Denial of equitable relief would result in the addition of the Doninger staff to the unemployment rolls. There is also a strong public interest in preserving the integrity and good faith of those involved in the procurement process.

OLIVER GASCH
Judge

Date: January 9th, 1983 [*sic*]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONINGER METAL PRODUCTS CORP.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 83-2725
UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	

ORDER

Upon consideration of the defendant's motion to dismiss or in the alternative for summary judgment, and plaintiff's motion for declaratory judgment and permanent injunction, the evidence presented at the trial of this action, the arguments of counsel and the briefs submitted by the parties, it is by the Court this 9th day of January, 1984,

ORDERED that defendant's motion to dismiss or in the alternative for summary judgment be, and hereby is, denied; and it is further

ORDERED that judgment be, and hereby is, entered that the action of the Assistant Postmast[er] General for Procurement and Supply in issuing a *de facto* suspension of the plaintiff was unlawful; and it is further

ORDERED that defendant United States Postal Service shall forthwith suspend the performance of so much of the contracts awarded pursuant to Solicitation No. 104230-82-B-0068 as would have been awarded to plaintiff in January 1983 had plaintiff's offer been accepted in full and award an

aluminum door lockbox contract to plaintiff in accordance with that offer; and it is further

ORDERED that the defendant shall afford the plaintiff an opportunity to compete on an equal footing with other offerors under any new solicitation that may be issued for lockboxes.

OLIVER GASCH
Judge